TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 963.

MICHAEL RYAN, APPELLANT,

v.

CENTRAL PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA

FILED NOVEMBER 18, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 983.

MICHAEL RYAN, APPELLANT,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF CALIFORNIA.

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1 I.—*Return of Sheriff to Summons.*

Office of the sheriff of the city and county of San Francisco.

I hereby certify that I received the annexed summons on the 23rd day of October, A. D. 1876, and personally served the same on the 23rd day of October, A. D. 1876, upon the Central Pacific Railroad Company, the therein-named defendant, by delivering to E. S. Miller, assistant secretary of said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a copy of the complaint in said action therein named.

Dated at San Francisco, this 23d day of October, 1876.

M. NUNAN,
Sheriff.
By J. J. MEAGHER,
Deputy Sheriff.

II.—*Summons.*

2 In the district court of the tenth judicial district of the State of California, in and for the county of Colusa.

MICHAL RYAN, Plaintiff, *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY, Defendants.	Action brought in the district court of the tenth judicial district of the State of California, in and for the county of Colusa, and the complaint filed in said county of Colusa, in the office of the clerk of said district court.

The people of the State of California send greeting to the Central Pacific Railroad Company, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the tenth judicial district of the State of California, in and for the county of Colusa, and to answer the complaint filed therein within
3 ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county, but in this district, within twenty days; otherwise, within forty days; or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a judgment and decree of this court perpetually restraining and enjoining you, the said defendants, from using a certain patent issued to you as evidence of title to the southeast quarter of section 3, township 16 north, range 2 west, Mount Diablo meridian, and for all other and further relief as in equity is just, proper, and meet. And further,

for his costs herein expended. All of which will more fully appear by reference to plaintiff's complaint, on file herein, a copy of which is hereunto attached.

And you are hereby notified that if you fail to appear
4 and answer the said complaint, as above required, the said plaintiff will take default, and ask the court for the relief prayed for in said complaint.

Given under my hand and the seal of the district court of the tenth judicial district of the State of California, in and for the county of Colusa, this 20th day of October, in [SEAL.] the year of our Lord one thousand eight hundred and seventy-six.

S. M. BISHOP,
Clerk.
By C. A. NEWTON,
Deputy Clerk.

"Endorsed:" Filed October 30th, 1876.
S. M. BISHOP,
Clerk.
By W. H. MILES,
Deputy.

III.—*Bill of Complaint.*

5 In the district court of the tenth judicial district of the State of California, in and for Colusa county.

MICHAEL RYAN, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, a Corporation formed under the laws of the State of California, Defendant.

The plaintiff in the above-entitled action complains of the defendant herein, and for cause of action avers that on the 14th day of July, 1876, and prior thereto, he was and now is a citizen of the United States, a married man, and over the age of twenty-one years.

That being desirous of availing himself of the provisions of the laws of Congress, granting homesteads to actual set-
6 tlers on the surveyed public lands of the United States, and not having had the benefit of the same, said plaintiffs, did, on said 14th day of July, 1876, at the United States Land Office, at Marysville, make and file his application, No. 1738, with the register of said land office, for an entry of homestead, under section 2289 of the Revised Statutes of the United States, for the following described tract of land, to wit: the southeast quarter of section three, (3,) in township sixteen, (16,)

north of range two (2) west, Mount Diablo meridian. And then and there said plaintiff made and filed his affidavit of homestead for said land, wherein he stated and declared upon his oath that he was a citizen of the United States, and the head of a family, and that his said application of homestead, No. 1738, was made for his exclusive benefit, and that his said entry of said land was made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit
7 of any other person or persons whomsoever, and that he had not theretofore had the benefit of said act; that his said affidavit so made was subscribed and sworn to by plaintiff before the register of said land office, who duly certified the same as having been subscribed and sworn to before him on said 14th day of July, 1876, and thereupon said plaintiff paid to the receiver of said land office the sum of sixteen dollars, being the amount of fee and compensation of register and receiver for the entry of said land, and received from him his duplicate receiver's receipt or the certificate of purchase for said land, dated July 14, 1876, which said plaintiff now holds as his evidence of title to the same.

Plaintiff further avers that the defendant herein is now and for several years last past has been a corporation, duly formed under the laws of the State of California; that heretofore, to wit, in the year 1871, as plaintiff is informed and believes, the
8 said defendant, by purchases then made, became, and ever since has been, the successor and owner of all the right, title, interest, property and land grants, which the California and Oregon Railroad Company, a corporation formed under the laws of the State of California, then owned or possessed; that by act of Congress approved July 25, 1866, there was granted to said California and Oregon Railroad Company, its successors or assigns, for the purpose of aiding in the construction of a railroad and telegraph line, beginning at a point on the line of said Central Pacific Railroad, in the Sacramento valley, and running thence northerly to the northern boundary of the State of California, and for other purposes in said act named, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and it was further granted in said act by Congress, that when any of said alternate sections or
9 parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands, designated as aforesaid, should be selected by said company, in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate

for his costs herein expended. All of which will more fully appear by reference to plaintiff's complaint, on file herein, a copy of which is hereunto attached.

And you are hereby notified that if you fail to appear
4 and answer the said complaint, as above required, the said plaintiff will take default, and ask the court for the relief prayed for in said complaint.

Given under my hand and the seal of the district court of the tenth judicial district of the State of California, in and for the county of Colusa, this 20th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

S. M. BISHOP,
Clerk.
By C. A. NEWTON,
Deputy Clerk.

"Endorsed:" Filed October 30th, 1876.

S. M. BISHOP,
Clerk.
By W. H. MILES,
Deputy.

III.—*Bill of Complaint.*

5 In the district court of the tenth judicial district of the State of California, in and for Colusa county.

MICHAEL RYAN, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, a Corporation formed under the laws of the State of California, Defendant.

The plaintiff in the above-entitled action complains of the defendant herein, and for cause of action avers that on the 14th day of July, 1876, and prior thereto, he was and now is a citizen of the United States, a married man, and over the age of twenty-one years.

That being desirous of availing himself of the provisions of the laws of Congress, granting homesteads to actual set-
6 tlers on the surveyed public lands of the United States, and not having had the benefit of the same, said plaintiffs, did, on said 14th day of July, 1876, at the United States Land Office, at Marysville, make and file his application, No. 1738, with the register of said land office, for an entry of homestead, under section 2289 of the Revised Statutes of the United States, for the following described tract of land, to wit: the southeast quarter of section three, (3,) in township sixteen, (16,)

north of range two (2) west, Mount Diablo meridian. And then and there said plaintiff made and filed his affidavit of homestead for said land, wherein he stated and declared upon his oath that he was a citizen of the United States, and the head of a family, and that his said application of homestead, No. 1738, was made for his exclusive benefit, and that his said entry of said land was made for the purpose of actual settlement and cultivation, and not directly or indirectly for the use or benefit
7 of any other person or persons whomsoever, and that he had not theretofore had the benefit of said act; that his said affidavit so made was subscribed and sworn to by plaintiff before the register of said land office, who duly certified the same as having been subscribed and sworn to before him on said 14th day of July, 1876, and thereupon said plaintiff paid to the receiver of said land office the sum of sixteen dollars, being the amount of fee and compensation of register and receiver for the entry of said land, and received from him his duplicate receiver's receipt or the certificate of purchase for said land, dated July 14, 1876, which said plaintiff now holds as his evidence of title to the same.

Plaintiff further avers that the defendant herein is now and for several years last past has been a corporation, duly formed under the laws of the State of California; that heretofore, to wit, in the year 1871, as plaintiff is informed and believes, the
8 said defendant, by purchases then made, became, and ever since has been, the successor and owner of all the right, title, interest, property and land grants, which the California and Oregon Railroad Company, a corporation formed under the laws of the State of California, then owned or possessed; that by act of Congress approved July 25, 1866, there was granted to said California and Oregon Railroad Company, its successors or assigns, for the purpose of aiding in the construction of a railroad and telegraph line, beginning at a point on the line of said Central Pacific Railroad, in the Sacramento valley, and running thence northerly to the northern boundary of the State of California, and for other purposes in said act named, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and it was further granted in said act by Congress, that when any of said alternate sections or
9 parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands, designated as aforesaid, should be selected by said company, in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first named alternate

sections; that, in pursuance of said grant of Congress, the defendant herein, as the successor of said California and Oregon Railroad Company, selected, about the year 1872, as plaintiff is informed and believes, the said southeast quarter of section 3, in township 16 north, range 2 west, Mount Diablo meridian, together with other lands claimed by defendant as enuring to it by virtue of said grant, and the same were afterwards, to wit, January 1, 1875, patented to said defendant, under the ap-
10 proval of the Secretary of the Interior.

But plaintiff avers, and shows to the Court, that said southeast quarter of section 3 and the whole of said township 16 north, range 2 west, not theretofore appropriated under foreign or Mexican grants, was at the time of the grant by Congress to said California and Oregon Railroad Company claimed by and included within the exterior boundaries of a Spanish or Mexican grant or claim, known as the Manuel Diaz grant or claim; that said southeast quarter of 3, and the whole of said township as aforesaid, was at the time of the grant by Congress to said California and Oregon Railroad Company, its successors or assigns, and at the time of the withdrawal of lands so granted by the Secretary of the Interior, on the 25th day of November, 1867, suspended and reserved from sale or appropriation by authority of the Land Department of the United States, on account of
11 said Manuel Diaz grant or claim; and that said lands were not finally released from suspension and restored to the body of the public lands until October, 1873; that the said Manuel Diaz grant, under which said land was claimed, was at the time of the aforesaid grant of lands by Congress to said California and Oregon Railroad Company, its successors or assigns, and at the time of the withdrawal of lands by the Secretary of the Interior for said company, to all intents and purposes, as far as it affected said land by reserving the same from sale, a valid claim: that said Manual Diaz grant was not finally rejected as a claim to said land until the final decision of the same by the Supreme Court of the United States at its December term, 1872.

Plaintiff avers that at the time he paid for said southeast quarter of section 3, and received his certificate of purchase for the same, said township 16 north, range 2 west, was sur-
12 veyed by the authority of the United States, and the township plat thereof had been on file in said United States Land Office for more than sixty days.

Plaintiff further avers and shows to the Court that by reason of the issuance of the patent to said defendant for said southeast quarter of section 3, he, plaintiff, is debarred the use and enjoyment of the same; that said patent is held and asserted by defendant in hostility to plaintiff's title to said land, and unless said defendant is perpetually restrained or enjoined from using

or asserting said patent as evidence of title to said land, great and irreparable injury will result to plaintiff in the use and enjoyment thereof.

Wherefore, the premises considered, the plaintiff invokes the equitable interposition of the Court, and prays that a decree be made and entered perpetually restraining or enjoining
13 said defendant from using said patent issued to it as evidence of title to said southeast quarter of section 3 in township 16 north, range 2 west, Mount Diablo meridian, and for all other and further relief, as in equity is proper, meet, and just, including costs herein expended.

FRAZIER & HARRINGTON,
Attys for Plaintiff.

STATE OF CALIFORNIA,
County of Colusa, ss:

Michael Ryan, first being duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are stated therein on information or belief, and as to those matters, that he believes it to be true.

His
MICHAEL x RYAN.
mark.

Subscribed and sworn to before me, this 19th day of
14 October, 1876.

S. M. BISHOP,
Clerk Dist. Court.

(Endorsed.) Filed Oct. 19th, 1876.

S. M. BISHOP,
Clerk.
By C. A. NEWTON,
Dept.

15 IV.—*Demurrer.*

In the district court of the tenth judicial district of the State of California, in and for the county of Colusa.

MICHAEL RYAN,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

Now comes the defendant in the above entitled action, and demurs to the complaint of the plaintiff on file in said action, on the following grounds, to wit:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

II.

That this court has no jurisdiction of the subject of the action, for that the object and purpose of the said action is in effect to set aside and cancel and declare null a patent of the
16 United States issued to the defendant for the land described in the complaint; and further, the jurisdiction to hear and determine as to the validity of patents of the United States for public lands and to declare such patents null is vested exclusively in the courts of the United States.

III.

That the plaintiff has not legal capacity to sue, for that an action to declare null a patent of the United States can only be brought in the name of the United States as plaintiff.

Wherefore, the premises considered, defendant prays judgment that the plaintiff take nothing by this action, and for costs.

W. C. BELCHER &
W. F. GOAD,
Attys. for Defendant.

"Endorsed:" Service of a copy hereof is admitted this 17th day of Nov., 1876.

17 FRAZIER & HARRINGTON,
Atty. for Pltff.

Filed Nov. 17th, 1876.

S. M. BISHOP, *Clerk*,
By C. A. NEWTON, *Deputy*.

V.—*Petition for Removal of Cause to U. S. Circuit Court, Dist. of Cal.*

18 In the district court of the tenth judicial district of the State of California, in and for the county of Colusa.

MICHAEL RYAN
vs.
CENTRAL PACIFIC RAILROAD COMPANY,

The petition of the Central Pacific Railroad Company, the defendant in the above entitled action, to the Court, respectfully shows that the defendant is a corporation duly formed and organized under the laws of the State of California, and has its principal place of business in the city of San Francisco, in said

State; that the said action is a suit in equity to determine the title and right of possession of the defendant to and of the south-
east quarter of section three, in township sixteen north,
19 range two west, Mount Diablo meridian, situate in said
county of Colusa, under a patent of the United States issued to the defendant, and is now pending in the said district court of the tenth judicial district of the State of California in and for said county of Colusa; that the said action has not been tried, and that the present term of said district court at which said action could be tried; that the said land is of the value of more than sixteen hundred dollars, and that the matter in dispute in said action exceeds, exclusive of costs, the sum or value of five hundred dollars, and that the said action arises under, and that its determination will necessarily involve the construction and interpretation of the laws of the United States, and particularly the act of Congress entitled an act granting lands to aid in the construction of a railroad and telegraph line from the
Central Pacific railroad in California, to Portland in
20 Oregon, approved July 25, 1866, and the acts of Congress
amendatory thereof and supplemental thereto, and as well the pre-emption and homestead laws of the United States. That the said patent granting lands to aid in the construction of such railroad and telegraph line; that subsequent to the issuing and delivery of the said patent for said land to defendant the plaintiff alleges that he filed in the United States land office for the Marysville land district, in the State of California, his application to enter the said land as a homestead, under the homestead laws of the United States, and asks the court to declare his claim to said land superior to that of defendant, and to enjoin defendant from asserting title thereto under the said patent, and defendant herewith presents its bond, with sureties, to the plaintiff, in the
sum of five hundred dollars, conditioned as required by
21 law, and to the effect that defendant will enter in the cir-
cuit court of the United States in and for the ninth judicial circuit and district of California, at its next session, a copy of the record in said suit, and will pay all costs that may be awarded by said circuit court, if said court shall hold that such suit was improperly removed thereto, and also for them appearing and entering special bail in such suit, if special bail was originally requisite therein.

And defendant asks that the said action be removed to the circuit court of the United States in and for the ninth judicial circuit and district of California for trial; and on further proceedings under the provisions of the act of Congress, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875.

In testimony whereof, said petitioner has caused this
22 petition to be signed by its vice-president (its president being absent from the State) and countersigned by its secretary, and its corporate seal to be hereunto affixed, pursuant to an order of its board of directors, made and entered of record on the 11th day of December, A. D. 1876.

[SEAL.]

CHAS. CROCKER,
2d Vice-Pres. C. P. R. R. Co.

E. H. MILLER,
Sec. C. P. R. R. Co.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

E. H. Miller, Jr., being first duly sworn, says he is the secretary of the Central Pacific Railroad Company, the defendant in the above-entitled action; that he has heard read the foregoing petition, and knows the contents thereof, and that the same is
23 true of his own knowledge, except the matters therein stated on his information or belief, and as to such matters he believes it true.

E. H. MILLER, JR.

Subscribed and sworn to before me, this 11th day of December, 1876.

[L. S.]

CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

"Endorsed." Service of copy accepted Dec. 12th, '76.
WM. FRAZIER and
JOHN T. HARRINGTON,
Attys. for Plff.

Filed Dec'r 12th, 1876.

S. M. BISHOP, *Clerk.*
By W. H. MILES, *Deputy.*

VI.—*Bond on Removal of Cause to U. S. Circuit Court, Dist. of Cal.*

24 In the district court of the tenth judicial district of the State of California, in and for the county of Colusa.

MICHAEL RYAN, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

We, the Central Pacific Railroad Company, a corporation duly incorporated under the laws of the State of California, of the city

and county of San Francisco and State of California, as principal, and Charles Crocker, of the same place, as surety, are held and firmly bound unto Michael Ryan, of the county of Colusa and State of California, in the sum of five hundred dollars, ($500,) lawful money of the United States of America, to be paid to the said Michael Ryan, his successors or assigns, for which
25 payment, well and truly to be made, we hereby bind ourselves, our successors, heirs, executors and administrators, firmly by these presents.

Sealed with our seals. Dated the eleventh day of December, A. D. 1876.

Whereas an action was brought on or about the nineteenth day of October, A. D. 1876, in the district court of the tenth judicial district of the State of California, in and for the county of Colusa, by the said Michael Ryan against the said Central Pacific Railroad Company, and the same is now pending for trial in said court, and is removable into the circuit court of the ninth circuit of the United States, in and for district of California, under the statutes of the United States in such case made and provided; and whereas the said Central Pacific Railroad Company has filed its petition in said first named court for the removal of said action into said last named court—

Now, therefore, the condition of this obligation is such that if the said Central Pacific Railroad Company, or its legal
26 successors, shall enter, or cause to be entered, in said circuit court of the ninth circuit of the United States, in and for the district of California, on the first day of its stated session next ensuing after the order of the said district court of the tenth judicial district of the State of California, in and for the county of Colusa, for the removal of said action into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said action, and do, or cause to be done, such other appropriate acts as are required to be done by the acts of Congress upon the removal of an action into the United States courts, then this obligation shall be void; otherwise it shall remain in full force and effect.

In testimony whereof said Central Pacific Railroad Company, pursuant to an order of its board of directors, made and entered of record on the eleventh day of December, 1876, has caused its seal to be hereunto affixed, and the names of its vice-presi-
27 dent (its president being absent from the State) and secretary to be hereunto subscribed, and the said Charles Crocker as surety has hereunto subscribed his name and affixed his seal.

[SEAL.] CHAS. CROCKER,
2d Vice-President Central Pacific Railroad Company.
E. H. MILLER, JR.,
Secretary Central Pacific Railraad Company.
28 CHARLES CROCKER, *Surety.*

STATE OF CALIFORNIA,
City and county of San Francisco, ss:

Charles Crocker, the surety in the foregoing obligation named, being duly sworn, deposes and says that he is a resident of the State of California, and a householder therein, and is worth the sum of five hundred dollars over all his just debts and liabilities,
and exclusive of property exempt by law from execu-
28 tion.

CHAS. CROCKER.

Subscribed and sworn to before me, this eleventh day of December, A. D. 1876.

[L. S.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I certify that on this eleventh day of December, A. D. 1876, before me personally appeared Charles Crocker, known to me to be the vice-president of the above-bounden Central Pacific Railroad Company, and E. H. Miller, Jr., known to me to be the secretary of the said company, and the same persons who executed the above obligation, as such president and secretary, and severally acknowledged to me that they executed the same freely
and voluntarily as the act of the said Central Pacific Rail-
29 road Company, and for the uses and purposes therein mentioned; that at the same time personally appeared Charles Crocker, known to me to be the person who executed the foregoing obligation by that name, and acknowledged that he executed said instrument freely and voluntarily for the uses and purposes therein named.

In testimony whereof I have hereunto set my hand
[SEAL.] and affixed my official seal on the day and year above written.

CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

"Endorsed." Service of copy accepted Dec. 12th, 1876.

WM. FRAZIER and
JOHN T. HARRINGTON,
Attys. for Plf.

Approved this 12th Dec., 1876.

PHIL W. KEYSER,
Dist. Judge.

Filed December 12th, 1876.

S. M. BISHOP,
Clerk.
By W. H. MILES,
Deputy.

VII.—*Order removing cause to U. S. Circuit Court, Dist. of Cal.*

30 STATE OF CALIFORNIA,
County of Colusa:

In the district court of the tenth judicial district. December term, A. D. 1876.

December 16, A. D. 1876.

Court met pursuant to adjournment.

Present: His Hon. Phil W. Keyser, presiding. D. H. Arnold, Sheriff. S. M. Bishop, Clerk.

And thereupon the following proceedings were had, to wit:

MICHAEL RYAN *vs.* C. P. R. R. Co. } Order granting removal of cause to U. S. Circuit Court, in accordance with the prayer of the defendants' petition, hereinbefore filed.

Court adjourned till Monday, 18th inst., at half-past 1, p. m.

PHIL W. KEYSER,
Judge.

31 STATE OF CALIFORNIA,
County of Colusa:

In the district court of the tenth judicial district. December term, A. D. 1876.

December 4, A. D. 1876.

Be it remembered, that on this 4th day of December, A. D. 1876, Court met pursuant to statute.

Present: His Hon. Phil W. Keyser, presiding. D. H. Arnold, Sheriff. S. M. Bishop, Clerk.

And thereupon the following proceedings were had, to wit:

MICHAEL RYAN *vs.* C. P. R. R. Co., } Passed till next week.

Court adjourned till 10 a. m., to-morrow.

PHIL W. KEYSER,
Judge.

VIII.—*Order approving Bond, and removing cause to U. S. Circuit Court, Dist. of Cal.*

32 STATE OF CALIFORNIA,
County of Colusa:

In the district court of the tenth judicial district. December term, A. D. 1876.

December 12, 1876.

Court met pursuant to adjournment.

Present: His Hon. Phil W. Keyser, presiding. D. H. Arnold, Sheriff. S. M. Bishop, Clerk.

And thereupon the following proceedings were had, to wit:

MICHAEL RYAN *vs.* C. P. R. R. Co. } Petition and bond for removal of case to circuit court of the U. S., presented to the court. Bond approved, and defendant moves that the cause be removed in accordance with the prayer of the petition.

33 Court adjourned till 10 a. m., to-morrow.

PHIL W. KEYSER,
Judge.

IX.—*Certificate of Clerk to Transferred Papers.*

34 STATE OF CALIFORNIA,
County of Colusa, ss:

I, S. M. Bishop, county clerk, and ex-officio clerk of the tenth judicial district court in and for said county, do hereby certify that the within and foregoing contains a full, true and correct copy of all papers on file in said action, and of the proceedings had therein.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 16th day of January, 1877. [SEAL.]

S. M. BISHOP,
Clerk.

By W. H. MILES,
Deputy.

(Endorsed.) In U. S. circuit court, district of California. Transferred papers. Filed 5th Feb., 1877.

L. S. B. SAWYER,
Clerk

By J. F. O'BEIRNE,
Deputy Clerk.

X.—*Answer.*

35 In the circuit court of the United States for the 9th circuit and district of California.

In Chancery.

MICHAEL RYAN, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, a corporation formed under the laws of the State of California, Defendant.

The answer of the Central Pacific Railroad Company, defendant, to the complaint of Michael Ryan, complainant.

This defendant, reserving all right of exception to the said complaint, for answer thereto saith: That this defendant has been informed, and believes it to be true, that on the 14th day of July, 1876, the said plaintiff was in all respects qualified
36 to avail himself of the provisions of the act of Congress entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20th, 1862, in manner and form as the said plaintiff hath in his said bill of complaint alleged; and that said plaintiff, on said 14th day of July, 1876, filed his application and affidavit as required by said act of Congress, in the United States Land Office, at Marysville, in the State of California, to be allowed to enter the land in his said complaint in this action described, as a homestead, and thereupon paid the lawful fees and received a duplicate receipt from the United States Register and Receiver therefor, in manner and form as the said plaintiff hath in his said bill of complaint alleged.

And this defendant further answering admits that now and for years past the defendant has been a corporation duly formed and existing under the laws of the State of California, and as
37 such has acquired and now owns, as the successor in interest of the California and Oregon Railroad Company, all the right, title, interests, property, and land grants of the said last-named corporation, held and acquired under the provisions of the act of Congress, approved July 25th, 1866, in manner and form as is by said plaintiff in his said bill of complaint alleged.

And this defendant further answering saith that it is true that the said lands in the complaint described, namely the southeast quarter of section (3) three, in township (16) sixteen north, range (2) two west, of Mount Diablo Meridian, were selected by this defendant, as the successor in interest of the said California and Oregon Railroad Company, by virtue of the grant and in pursuance of the provisions of the said act of Congress of

July 25, 1866, but that the same were selected on the 30th day of October, 1874, and not in the year 1872, as is erroneously supposed in said complaint.

And this defendant, further answering, saith: That on
38 said 30th of October, 1874, it was found that the alternate sections of land within the twenty-mile limits mentioned and described in said act of Congress of July 25, 1866, (not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of,) were insufficient to satisfy the grant made in said act to the said California and Oregon Railroad Company, their successors and assigns, and thereupon this defendant, as the successor in interest of the said last named company, in pursuance of the said act of Congress, and under the direction of the Secretary of the Interior, selected the said lands in the complaint described, with others, in lieu of and as indemnity for lands lost under the provisions of the said act, and applied for a patent therefor, the said land being within the limits prescribed by said act, and being vacant public lands of the United
39 States, and subject to be so selected; that said selection so made in all respects in the manner provided in said act of Congress, was examined by the register and receiver of the United States land office at Marysville, and it appearing to said officers that there were not sufficient alternate sections of land within the twenty-mile limits of said grant (not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of) to satisfy the grant by said act made, they the said officers approved the said selection as lieu or indemnity land as aforesaid on the 26th day of December, 1874, and forwarded the same to the Commissioner of the General Land Office, and said selection was afterwards approved by the Secretary of the Interior, and a patent duly issued and delivered to this defendant for the said lands on the 17th day of March, 1875, and not on the 1st day of January, 1875, as erroneously stated in said complaint.

And this defendant, further answering, saith: That it is
40 true, and this defendant admits, that at the date of the passage of the said act of Congress making the grants to the said railroad company the lands in the complaint described were within the exterior boundaries of the said Mexican grant, known as the Manuel Diaz grant, and that the same were suspended and reserved by the authority of the land department on account of the said Diaz grant on the 22d day of January, 1873, and that the same were not finally released from suspension and restored to the body of the public lands of the United States until the 18th of August, 1873, and not October, 1873, as is erroneously stated in said complaint.

And this defendant, further answering, admits that the said Manuel Diaz grant was finally rejected by the Supreme Court of

the United States at its December term, 1872, to wit: on
41 the 3d day of March, 1873, on which day it was finally rejected by the said Supreme Court.

And the said defendant further answering, avers that the land in the complaint described was at the date of its selection as aforesaid under the provisions of the said act of Congress vacant public land of the United States, within the limits prescribed by the said act, and liable to be selected, and was selected by this defendant as successor of the said railroad company, in lieu of lands lost as being reserved, &c., or otherwise disposed of within the twenty-mile limits, as provided in said act of Congress, and when thus selected under the provisions of the act, the grant became definite and effective, and upon the approval of said selection by the proper department of the Government, and the issuing of the patent therefor to this defendant as the successor in interest of the said California and Oregon Railroad Company, the
42 title of the United States to the same vested in this defendant, and the subsequent application and entry of the said land by the plaintiff on the 14th day of July, 1876, as and for a homestead, as stated in said complaint, was wholly unlawful and void, and conveyed no right, interest, or title to the said plaintiff to the same.

And this defendant submits to this honorable court that the said plaintiff has not by his said complaint shown such a case as entitles him to any such relief as is thereby prayed, or any other relief whatever touching the several matters therein complained of, or any of them; and this defendant hopes to have the same benefit of this defense as if it had demurred to the said complainant's bill.

And this defendant denies all and all manner of unlawful combination, and so forth, without this, that there is any other matter, cause, or thing in the said complainant's said bill of
43 complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, confessed, and avoided or denied, is true, to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained.

_____, _____,
President of the Central Pacific R. R. Co.

J. P. HOGE,
Of Counsel for Deft.

In circuit court of the United States, district of California, *ss:*

MICHAEL RYAN, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant,

44 On the 12th day of December, 1877, before me, personally appeared Leland Stanford, president of the Central Pacific Railroad Company, and made oath that he has read the above answer of the Central Pacific Railroad, subscribed by him as president, and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true, and that the seal affixed thereto is the seal of the corporation, and was affixed by authority of the same.

SEAL OF C. P. R. R. CO.

LELAND STANFORD,
President C. P. R. R. Co.

Subscribed and sworn to before me, this 12th day of December, A. D., 1877.

CHAS. J. TORBERT,
United States Commissioner District of California.

Endorsed: Due service of the within answer by copy admitted, this — day of July, 1878.

JOHN T. HARRINGTON,
O. P. EVANS,
Attorneys for Plff.

Filed 15 July, 1878.
L. S. B. SAWYER,
Clerk.

XI.—*Enrollment.*

45 At a stated term of the circuit court of the United States of America for the district of California, held at the court-room, in the city of San Francisco, on Monday, the 30th day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

MICHAEL RYAN
vs.
CENTRAL PACIFIC RAILROAD COMPANY.

The defendant herein, on the 5th day of February, A. D. 1877, filed in this court a transcript of all the papers on file in said action, which action was, by the district court of the 10th judicial

district of the State of California, in and for Colusa county,
46 duly transferred to this court.

On the 15th day of July, A. D. 1878, the demurrer to the bill of complaint herein was withdrawn.

On the 15th day of July, A. D. 1878, defendant filed its answer to said complaint, which answer is hereto annexed.

XII.—*Decree.*

Thereafter, to wit: On the 30th day of September, A. D. 1878, said cause having previously been brought to a hearing, a final decree was filed and entered herein, in the words and figures following, to wit:

At a stated term of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court room in the city of San Francisco,
on Monday, the 30th day of September, in the year of our
47 Lord one thousand eight hundred and seventy-eight.
Present: The Honorable Lorenzo Sawyer, Judge.

MICHAEL RYAN
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } No. 1722.

This cause having come on to be heard at this term, and having been argued by counsel; thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the complainant's bill be, and the same hereby is, dismissed, and that said complainant pay said defendant its costs in this behalf expended to be taxed.

(Signed,) LORENZO SAWYER,
U. S. Circuit Judge.

Endorsed. Filed and entered September 30th, 1878.
L. S. B. SAWYER,
Clerk.

XIII.—*Certificate of Clerk to Enrolled Papers.*

48 Whereupon said pleadings and final decree are hereto annexed, said decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, &c.:
[SEAL.] L. S. B. SAWYER,
Clerk.
By J. F. O'BEIRNE,
Deputy Clerk.

Endorsed. Enrolled Papers. Filed 30th September, 1878.
L. S. B. SAWYER,
Clerk.
By J. F. O'BEIRNE,
Deputy Clerk.

XIV.—*Agreed Statement of Facts.*

49 In the circuit court of the 9th judicial circuit of the United States, in and for the district of California.

MICHAEL RYAN, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant.

For the purposes of the trial of the above-entitled action, it is hereby stipulated and agreed by and between the parties thereto, as follows:

I.

That on the 14th day of July, A. D. 1876, said plaintiff was in all respects qualified to avail himself of the provisions of an act of Congress, entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862.

50 II.

That on the said 14th day of July, A. D. 1876, said plaintiff filed an application, accompanied by his affidavit, as required by said act of Congress, in the United States land office, at Marysville, in the State of California, to be allowed to enter the lands in controversy in said action as a homestead, and thereupon paid the lawful fees, and received a duplicate receipt from the United States register and receiver therefor.

III.

That afterwards said plaintiff built a dwelling-house on said land, and on the 4th of November, 1876, moved into said house with his family, and has continued to reside therein ever since with his family, and has cultivated and is now cultivating said land.

IV.

51 That said lands are within the ten mile or indemnity limit mentioned in the grant of the United States, made by act of Congress of the 25th of July, 1866, to the California and Oregon Railroad Company, which act is here referred to and made a part hereof.

V.

That the defendant has succeeded to all the rights of said California and Oregon Railroad Company acquired under said act of Congress.

VI.

That at the date of said grant to said Railroad Company, said lands were within the exterior boundaries of a certain Spanish or Mexican grant, known as the Manuel Diaz grant, which grant was, by final judgment of the Supreme Court of the United States, declared to be invalid on the 3d day of March, 1873, and on that day finally rejected.

VII.

That on the 30th day of October, 1874, it appeared to the defendant, and such was the fact, that the alternate sections
52 of lands within the twenty mile limits mentioned in said act of Congress of the 25th of July, 1866, not granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, were insufficient to satisfy the grant made in said act to said California and Oregon Railroad Company.

VIII.

That thereupon said defendant, on said 30th day of October, 1874, selected the lands in question, and applied for a patent therefor, in all respects in the manner provided in said act of Congress of the 25th of July, 1866. Said selection was examined by the register and receiver of the United States land office at Marysville, and it appearing to them that there were not sufficient alternate sections of land within the twenty mile limits of said grant (not granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of) to satisfy the
53 grant made by said act, approved said selection as indemnity for a portion of the lands so lost, on the 26th day of December, 1874, and thereafter forwarded the same to the Commissioner of the General Land Office at Washington. Said selection was thereupon approved by the Secretary of the Interior, and a patent directed to be issued to defendant, which patent was issued to defendant on the 17th day of March, 1875.

IX.

That at the date of said selection by said defendant said lands were public lands.

JOHN T. HARRINGTON,
Atty. for Plaintiff.
J. P. HOGE, *Atty. for Defdt.*

Endorsed. Filed 18 July, 1878.

L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Dep. Clk.

XV.—*Opinion.*

54 In the circuit court of the United States, in and for the district of California.

MICHAEL RYAN
vs.
CENTRAL PACIFIC R. R. Co.

1. RAILROAD GRANTS—LIEU LANDS.—A grant of the alternate sections of land designated by odd numbers within twenty miles on each side of the road was made to aid in the construction of the California and Oregon Railroad, with a provision that if it should be found that there was not sufficient land within the limits indicated, not sold, reserved, subject to pre-emption, etc., then the grantee might select in lieu thereof enough land to make up the deficiency out of the nearest alternate sections designated by
55 odd numbers outside, but within ten miles of the said limit. The road was located through a tract of country lying within the exterior limits of land claimed under a Mexican grant, for which a claim for confirmation was pending in the United States courts at the time the plat of the survey was filed with the Secretary of the Interior, and the lands withdrawn from public sale, etc. The claim under the Mexican grant was finally rejected, and after such rejection there being a deficiency, lieu lands were selected outside of the twenty-mile limit on each side, but within the exterior limits before claimed under said rejected grant. *Held:* 1. That the grant attached to the specific alternate sections designated by odd numbers within the forty-mile limit on the filing of the plat of survey of the line with the Secretary of the Interior, and
56 the withdrawal of the land from sale, etc. 2. That the grant did not attach to any particular land outside said limit to make up a deficiency until said deficiency had been ascertained, and the selection in lieu thereof actually made. 3. That the Mexican grant covering the lands situated within the limits from which such lieu lands were authorized to be selected, having been finally rejected before such deficiency was ascertained and selections in lieu thereof made, the odd sections outside of the forty-mile

limit so embraced in the exterior bounds of said rejected grant were subject to selection to supply such deficiency.

2. SANGER *vs.* NEWHALL, (2 Otto, 761,) distinguished.

3. STATUTE CONSTRUED, (14 U. S. Statutes, 239.)

57 SAWYER, Circuit Judge.

On July 25, 1866, Congress passed an act granting the alternate sections of public land, not mineral, for a distance of twenty miles on each side of the line of the road, to aid in the construction of a railroad by the California and Oregon Railroad Company, (14 Stat. 239.) It was also provided that "when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, the lands designated as aforesaid, *shall be selected* by said company in lieu thereof," out of the nearest land within ten miles outside of the lands so granted, etc. The rights of said California and Oregon Railroad Company have become vested in the defendant. The road was located through a tract of land claimed under a Mexican grant to one Manuel Diaz, and at the time of the location proceed-

58 ings were pending in the courts of the United States for a confirmation of said grant. The said grant was finally rejected as invalid by the Supreme Court of the United States, on March 3, 1873. On October 30, 1874, it was found that there was not sufficient land within the said forty-mile limit subject to the grant to satisfy the said grant; and, thereupon, on said day, the said defendant selected the land in question, and applied for a patent therefor as lieu lands under the provisions of the act, the said lands being an alternate odd section, and lying outside and within ten miles of the said forty-mile limit, and being within the exterior limits of said grant claimed to have been made to Diaz. The Register and Receiver of the Marysville Land Office approved said selection December 26th, 1874, which approval was affirmed by the Secretary of the Interior, and a patent in due form was thereupon issued to defendant therefor on March

59 17th, 1875. At the date of said selection said land was public land, said Mexican grant having more than a year and a half before that time been finally rejected, and it was not within any other of the exceptions indicated or implied in the act.

Afterwards, on July 14th, 1876, the complainant, being in all respects qualified, filed an application in due form to be allowed to enter the said land under the Homestead Act of 1862; paid the proper fees, and received a duplicate receipt therefor from the Register and Receiver of the Land Office of the district. He now files his bill to restrain the defendant from using its patent, upon the ground that said land was not subject to selection in lieu of the

lands specifically granted. The land, being at the time of the passing of the Act of Congress, and the filing of the map of the survey and withdrawal from sale in the office of the Secretary of the Interior, within the limits of land claimed under a Mexican
60 grant, the only question is, whether it was excluded from lands from which lieu lands could be selected, notwithstanding the fact that the grant had been finally rejected long before the selection was made? It is claimed by complainant that the case is controlled by the decision in *Sanger* vs. *Newhall*, (2 Otto, 762.) I think it clearly not within the rule adopted in that decision. In that case the grant attached to the specific sections within the limits indicated at the time the location of the road became fixed; or, at least, it took effect upon the withdrawal of the lands by the Secretary of the Interior, from preemption, private entry and sale, etc. (12 Stat., 492, sec. 37; 2 Otto, 762.) At the time the right of the railroad company attached there was pending a claim for confirmation of a Mexican grant embracing within its exterior boundaries the land in question; and this was held to take the land out of the cate-
61 gory of "public lands," as that term was used in the act, and consequently, that they were not within the terms of the grant at the time the right attached to the odd numbered sections. This is the ground upon which the decision is rested.

The court says: "There can be no doubt that *by the withdrawal the grant took effect upon such odd-numbered sections* of public lands within the specific limits as were not excluded from its operation, and the question arises whether lands within the boundaries of an alleged Mexican grant which were *then*, [at the time when the grant took effect upon the odd-numbered sections,] *sub judice*, public within the meaning of the act of Congress." (2 Otto, 762.) In the case now under consideration the grant is *specific* only to the alternate sections designated by odd numbers within twenty miles on each side of the railroad line; and to these sections only did the grant specifically attach upon filing the map of
62 location and withdrawal from sale, etc., thereon by the Secretary of the Interior. Such lands as were thus specifically affected by the grant, and were within the exterior limits of a Mexican grant for which a claim was still pending, and such only, are within the decision of *Sanger* vs. *Newhall*. Whatever difference of opinion there may have been, and may still be, notwithstanding the decision in that case, by a divided court, as to the lands under the conditions of that case, there can be none, I apprehend, on the proposition that the lands in that case would have passed to the railroad company if the Mokelumne grant had been finally rejected before the line of the road had become "definitely fixed." Before that time the grant was a mere float, depending wholly upon the future location of the road. The act

of Congress gave a right to the grantee to annex the grant to land that might be open to appropriation along any line it
63 might select. It required a location of the road to attach the grant to any specific land. And upon the location it attached to all odd sections upon which there was, at that time, no other claim. And the right of location was in the grantee. In this case the right to select other lands in lieu of the sections specifically designated, which were found to have been previously appropriated, was, also, a pure float within certain limits; and it did not attach to any specific land until it had been finally ascertained that a deficiency existed, and not even then until a selection had been made by the grantee. The right attached to the specific land upon the selection, and not before. And at the time when the deficiency was ascertained and the selection made, and long before that time, the Mexican grant had been finally rejected, and the lands were unincumbered public lands open to selection for homesteads, pre-emptions, or for any lawful
64 purpose, without any obstruction whatever. Indeed, there is no *express* exception in *this act, as there was in the Central Pacific act*, of lands reserved, occupied by homestead settlers, pre-emptions, etc. The exception arises by implication only, from the provision that when any of the alternate sections "shall be found to have been granted, sold, reserved," etc., other lands "designated as aforesaid"—that is to say, "alternate sections," "designated by odd numbers"—"shall be selected," etc., and this exception by implication only extends by its terms to the twenty-mile limit on each side of the line. But it was doubtless not intended that a selection should be made of lands in which some prior existing right had become vested. Congress manifestly designed the grant to be for the full amount of land indicated; and the only object of any exception at all of the classes mentioned was to prevent interference with rights existing in
65 others. The exception was not designed *to limit the grant*, but to avoid disturbing substantial rights already vested and still existing. And, that the company might get its full quantity, Congress authorized it to make up any deficiency by reason of any prior right that might have attached to any lands specifically designated by selecting other lands outside the designated limits. The intention was to give the full amount of land designated, and the only care of Congress was not to interfere with rights already vested and still existing. The right to the lieu lands only attached on the selection, and at that time there was no conflicting interest. All reason for any exception at all had ceased to operate. Any less favorable construction would practically nullify this grant along a large portion of the line, or any other grant in similar terms throughout a large portion of
66 the State. For examples, in very many cases, indeed, almost

universally in California, Mexican grants were for a specific quantity of land within exterior boundaries containing a much larger quantity, like the grant in Fremont's case, (17 How., 573,) which was for ten leagues within exterior boundaries containing a hundred leagues. So, also, the grant to Yturbide, the rejection of which was affirmed in 22 How., 290, was for four hundred square leagues within exterior boundaries embracing the whole State. Had that single grant chanced to have been undisposed of at the time of the location of any of the several roads in California receiving land grants, not one foot of land would have passed to any railroad company in the State under the decision in *Newhall* vs. *Sanger*. The grant now in question was intended to be substantial, not a mere delusion; and the act should be construed as it was intended to be understood by Congress at the time it was passed, and not as it may suit the con-
67 venience or interest of parties who come in seeking the advantages resulting from the construction of the road after its completion, under the act by the parties who built it relying upon this grant. Any construction which shall deprive the defendant of the lands which it reasonably had a right to expect under the act of Congress would wrongfully wrest from it, by judicial sanction, a large portion of the consideration which formed the inducement to the undertaking. I can perceive no plausible ground for the view maintained by the complainant, or for extending the principles adopted in *Newhall* vs. *Sanger* beyond the limits required by the decision. The judgment in that case is binding upon this court, and must be followed as to all lands in the same category. In my judgment the land in question does not fall within the decision, and it was subject to selection, and the title in the railroad company is valid.

68 The bill must be dismissed. Let a decree be entered accordingly.

September 30, 1878.

O. P. EVANS, for complainant.
J. P. HOGE, for respondent.

Endorsed: Read in open court, and filed this 30th day of September, A. D. 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dp'y Clk.*

XVI.—*Order Granting an Appeal.*

69 At a stated term of the circuit court of the United States of America for the district of California, held at the court room in the city of San Francisco, on Tuesday, the 22d day of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Present: The Honorable Lorenzo Sawyer, Circuit Judge.

MICHAEL RYAN,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY.

Now, at this day, on motion of O. P. Evans, Esq., solicitor of the complainant, it is ordered that an appeal from the decision rendered and the decree ordered and filed and entered in the above-entitled cause on the 30th day of September, A. D. 1878,
of the July term, A. D. 1878 of said circuit court to the
70 Supreme Court of the United States of America, be, and
the same is hereby, allowed, and that a certified transcript of the pleadings and proceedings be forthwith transmitted to the Supreme Court of the United States of America, upon the appellant giving a bond in the sum of five hundred dollars.

XVII.—*Bond on Appeal.*

71 In the Supreme Court of the United States of America.

MICHAEL RYAN, Appellant,
vs.
CENTRAL PACIFIC RAILROAD, Appellee.

Know all men by these presents, that we, Robert Robinson and Benjamin B. Redding, as sureties are held and firmly bound unto the Central Pacific Railroad Company in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Central Pacific Railroad Company, its successor or successors. To which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this twenty-fourth day of
72 October, A. D. 1878.

Whereas, the above-named Michael Ryan has taken an appeal to the Supreme Court of the United States of America to reverse the decree rendered by the circuit court of the United States of the ninth judicial circuit in and for the district of California in the suit entitled Michael Ryan *versus* The Central Pacific Railroad Company.

Now, therefore, the condition of this obligation is such that if the above-named Michael Ryan shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

ROBERT ROBINSON. [SEAL.]
BENJAMIN B. REDDING. [SEAL.]

Signed, sealed, and delivered in presence of
L. S. B. SAWYER.

73 UNITED STATES OF AMERICA,
District of California, ss:

Robert Robinson and Benjamin B. Redding, being first duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of five hundred dollars lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

ROBERT ROBINSON.
BENJAMIN B. REDDING.

Subscribed and sworn to before me, this 24th day of October, A. D. 1878.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, 9th Cir., Dist. Cal.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon hereby approved.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Jud. Circuit.

Filed October 24, 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep'y Clk.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing seventy-three written pages, numbered from 1 to 73, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the therein entitled cause, and that the same together constitute the transcript on appeal to the Supreme Court of the United States therein.

[SEAL.] Witness my hand and seal of said circuit court, this 28th day of October, A. D. 1878.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Supreme Court of the United States.

No. 983.

MICHAEL RYAN, PLAINTIFF AND APPELLANT,

vs.

CENTRAL PACIFIC RAILROAD COMPANY,
DEFENDANT AND APPELLEE.

APPELLANT'S BRIEF.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH CIRCUIT,
DISTRICT OF CALIFORNIA.

JOHN CURREY,
Attorney for Appellant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 983.

MICHAEL RYAN, PLAINTIFF AND APPELLANT,

vs.

CENTRAL PACIFIC RAILROAD COMPANY,
DEFENDANT AND APPELLEE.

APPELLANT'S BRIEF.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

The agreed statement contained in the record presents the facts.

On the 25th day of July, 1866, when Congress passed the act granting certain lands to the California and Oregon Railroad Company, under which the appellee now claims, there was pending a claim for confirmation of a Mexican grant, embracing within its exterior boundaries the land in question, and consequently it is claimed by the appellant that, under the authority of Newhall *vs.* Sanger (2 Otto, 761), the land did not pass by that grant, and that the appellant, Ryan, could acquire title thereto under the homestead act.

The second section of the act under which the appellee claims, is in the following words, to wit:

"SEC. 2. *And be it further enacted*, That there be, and "hereby is, granted to the said companies, their successors "and assigns, for the purpose of aiding in the construction "of said railroad and telegraph line, and to secure the safe "and speedy transportation of the mails, troops, munitions "of war, and public stores, over the line of said railroad, "every alternate section of public land, not mineral, desig- "nated by odd numbers, to the amount of twenty alternate "sections per mile (ten on each side) of said railroad line; "and when any of said alternate sections, or parts of sec- "tions, shall be found to have been granted, sold, reserved, "occupied by homestead settlers, pre-empted or otherwise "disposed of, other lands, designated as aforesaid, shall be "selected by said companies in lieu thereof, under the direc- "of the Secretary of the Interior, in alternate sections de- "signated by odd numbers as aforesaid, nearest to and not "more than ten miles beyond the limits of said first named "alternate sections, &c., &c."

14 U. S. Statutes at Large, pp. 239, 240.

The agreed statement shows—

"That at the date of said grant to said railroad company, said lands were within the exterior boundaries of a certain Spanish or Mexican grant, known as the Manuel Diaz grant, which grant was, by final judgment of the Supreme Court of the United States, declared to be invalid on the 3d day of March, 1873, and on that day finally rejected."

The railroad selected the land in question, with other lands, in 1874.

The appellant, Ryan, applied to purchase the same in 1876.

If the land passed under the Congressional grant, the railroad was and is entitled to its patent; but if the land did not pass under that grant, then the patent was issued improperly and without authority, and Ryan should be allowed to perfect his title—and at the same time restrain the

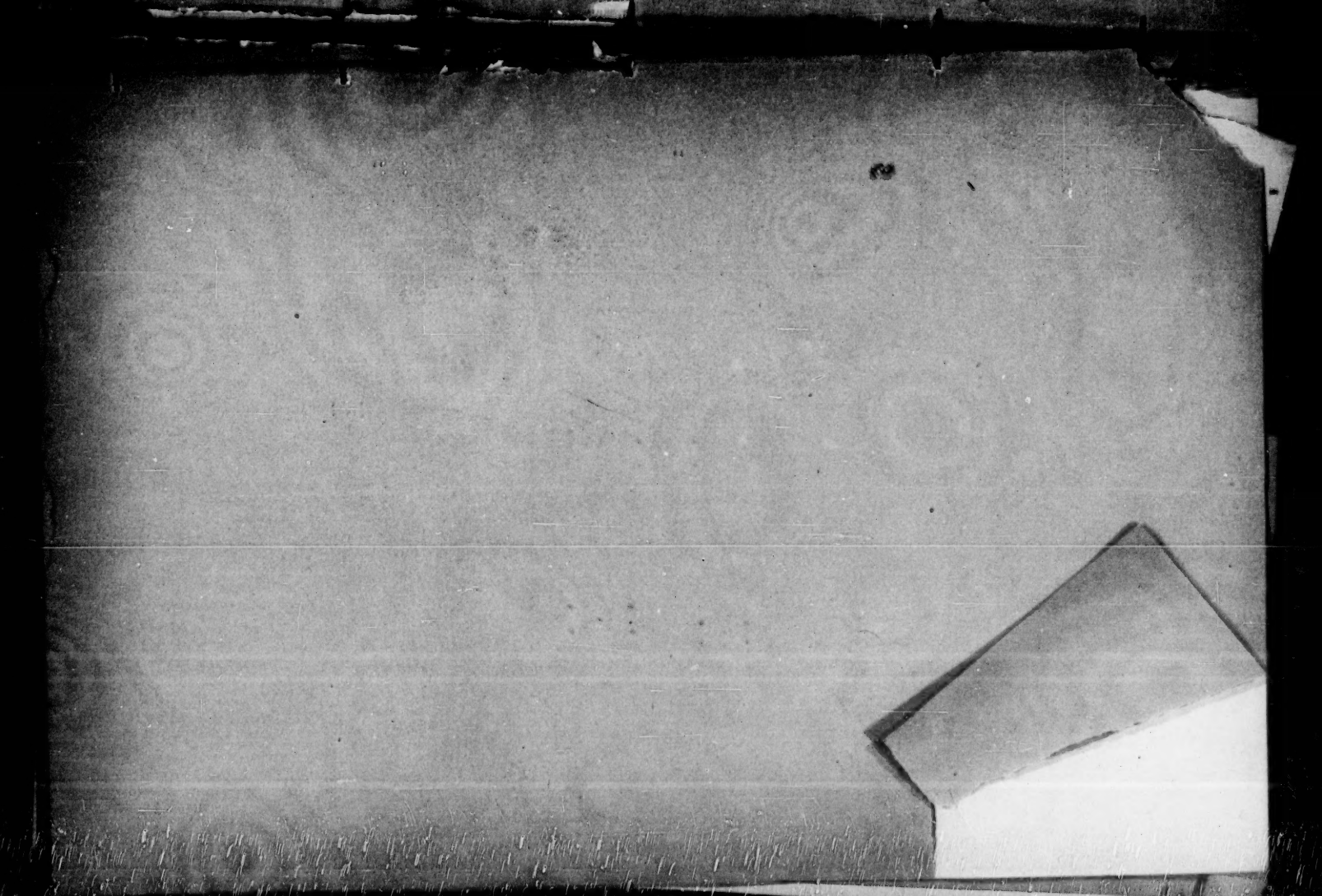
use of the patent by the railroad, until the Government takes action in the premises.

Biddle Boggs *vs.* Merced Mining Co., 14 Cal., 365.
People *vs.* Stratton, 25 Cal., 252.

The language of the grant to the California and Oregon Railroad Company is almost identical with the language which was construed by this Court in Newhall *vs.* Sanger, in which it was held that lands within the boundaries of an alleged Spanish or Mexican grant, which was then *sub judice*, did not pass by the grant to the railroad.

It is respectfully submitted that this case falls within the doctrine of Newhall *vs.* Sanger, and that the judgment of the circuit court is erroneous.

JOHN CURREY,
Attorney for Appellant.



Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 983.

MICHAEL RYAN, APPELLANT,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY,
APPELLEE.

BRIEF OF S. W. SANDERSON FOR APPELLEE.

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CASE.

This is a suit in equity to enjoin and restrain the appellee from relying upon or using as evidence a patent, issued to it by the United States for a tract of land in the State of California, being the southeast quarter of section 3, in township 16 north, range 2 west, Mount Diablo meridian. The appellant is a qualified homesteader, and claims the land under and by virtue of an "entry of homestead," under section 2289 of the Revised Statutes. His claim is good if, as he alleges, the appellee's patent is invalid.

The appellee is successor to the California and Oregon Railroad Company, to which a grant of lands was made, to aid in the construction of a railroad from a point on the Central Pacific Railroad in the Sacramento valley, to Portland in the State of Oregon, by an act of Congress of July

25, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon."

Section 2 of that act reads as follows:

"SEC. 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and *when* any of said alternate sections, or parts of sections, *shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of*, other lands designated as aforesaid shall be selected by said companies in lieu thereof, *under the direction of the Secretary of the Interior*, in alternate sections, designated by odd numbers, as aforesaid, nearest to and not more than ten miles *beyond the limits* of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and *within* the *limits* before specified. * * *."

14 U. S. S. at L., 239.

The land in controversy is not situated within the limits of this grant, (twenty miles on each side of the railroad,) but is situated within the ten-mile limits from which the appellee is allowed to select lands, "under the direction of the Secretary of the Interior," *when* it shall be found that any of the alternate sections, or parts of sections, designated by odd numbers, within the limits of the grant, (twenty miles on each side of the railroad,) have been granted, sold, &c., in *lieu* of the sections or parts of sections so found to be granted, sold, &c.

At the time this grant was made to the railroad company the land in controversy was within the exterior boundaries of a certain Mexican grant or claim known as the Manuel Diaz grant, which was afterwards, however, declared to be invalid, and was finally rejected by this Court on the 3d day of March, 1873.

On the 30th day of October, 1874, nearly two years after said Mexican grant had been finally rejected by this Court, the railroad company (having in the meantime constructed its road through this region, and having thereby earned the twenty alternate sections per mile granted to it, designated by odd numbers, opposite to said road and within twenty miles on each side thereof,) found that there were not sufficient odd sections within the limits of its grant, not otherwise granted, &c., to make the quantity to which it was entitled; and thereupon it selected, with other lands, the land in controversy and applied for a patent therefor, observing and performing in all respects all the requirements of the act of July 25, 1866, by which its grant was made as aforesaid. This selection was examined by the register and receiver of the United States land office at Marysville, and it appearing to them that there were not sufficient alternate sections of land within the twenty-mile limits of the railroad grant, not otherwise granted, &c., to satisfy the grant, they approved said selection in lieu of the lands so lost, on the 26th day of December, 1874, and thereafter forwarded the same to the Commissioner of the General Land Office at Washington. The selection was thereupon approved by the Secretary of the Interior (as provided in the act by which said railroad grant was made,) and a patent directed to be issued to the railroad company, which patent was issued to the company on the 17th day of March, 1875.

More than a year after the railroad company had received its patent, (this court having in the meantime decided the cases of the *Leavenworth &c., R. R. Co.* vs. *United States* and *Newhall* vs. *Sanger*, 2 Otto, 732 and 761,) the appellant, acting

upon the supposed authority of those cases, (being in all respects qualified to avail himself of the provisions of an act of Congress of May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain,") on the 14th day of July, 1876, filed an application accompanied by his affidavit, as required by said act of Congress, in the United States land office at Marysville, in the State of California, to be allowed to enter the land in question as a homestead, and thereupon paid the lawful fees and obtained the customary duplicate receipt from the register and receiver of that office. Afterwards he built a house upon the land, and on the 4th of November, 1876, moved into said house with his family, and has continued to reside therein with his family ever since, and has cultivated and is now cultivating the land. Afterwards he commenced this suit to quiet his title in one of the State courts. On motion of the appellee the suit was removed to the circuit court of the United States. There being no controversy about the facts, they were agreed to by counsel, and will be found at page 18 of the record. The court below held that the appellant was entitled to no relief, and dismissed his bill, from which decree he has taken an appeal to this court. For opinion of the court below see page 20 of the record.

ARGUMENT.

I.

The Rule in Newhall vs. *Sanger is not applicable to this Case.*

The sole reliance of the appellant in support of his case is found in the decision of this court in the case of *Newhall* vs. *Sanger*, 2 Otto, 761.

It was held in that case that lands within the exterior boundaries of a Mexican or Spanish claim, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the Western Pacific

Railroad, were not embraced in the grant to the Western Pacific Railroad Company. In that case the land in controversy was situated *within* the limits of the railroad grant, and *within* the limits of the lands which were withdrawn, by order of the Secretary of the Interior, for the purposes of the grant. In this case, however, as already stated, the land in controversy is situated *outside* of the limits of the railroad grant and *outside* of the limits of the withdrawal, but *within* the limits of the indemnity lands. Hence this case is clearly distinguishable from *Newhall* vs. *Sanger* on the score of facts, and, as I hope to show, also on the score of principle.

If, however, the rule in *Newhall* vs. *Sanger* is to be applied to this case, the question presented by the record is simply this: Did the railroad company's right—or whatever it may be called—to the odd sections, situated within the indemnity limits, attach at the same time its right attached to the odd sections situated within the granted limits? If it did, then the reasoning and the rule in *Newhall* vs. *Sanger* will apply to this case and govern its decision, if, as already suggested, the rule in that case is to be adhered to.

It is submitted that the right of the railroad company in respect to odd sections within the indemnity limits—whatever that right may be called—did not attach to particular tracts, until they had been *actually selected* "under the direction of the Secretary of the Interior," as provided in the second section of the act of July 25, 1866, above quoted. If this be so, the judgment of the court below is right, and must be affirmed, even in full view of the rule in *Newhall* vs. *Sanger;* for, as the case shows, the selection of this land was not made until nearly two years after the Manuel Diaz claim had been rejected by this Court—the selection having been made on the 30th day of October, 1874, and the Diaz claim having been rejected on the 3d of March, 1873. If this be so, the land in question at the time of this selection was, and had been for a long time previous, a part of the public

domain, within the rule in *Newhall* vs. *Sanger*, and subject to the absolute disposal of the United States.

Referring to the language of the grant above quoted, it will be seen that the grant is of twenty alternate sections per mile (ten on each side) of the railroad line, and that when the company shall have filed in the office of the Secretary of the Interior a map of the survey of its road, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale the lands thereby granted, on each side of said railroad, so far as located and *within the limits before specified.* Thus it is clear that nothing is granted beyond or outside of the twenty-mile limits, nor are any lands outside of those limits to be withdrawn from sale by the Secretary of the Interior. The lands outside of the twenty-mile limits, and within the ten-mile limits, were not granted, nor were they to be withdrawn from sale by the Secretary of the Interior. They were to remain after the grant and withdrawal, as they were before, subject to sale or other disposal of the United States, the same as if no such grant had been made.

According to the rule in *Lessieur* vs. *Price* (12 How., 59,) and numerous other cases, this grant "was a present grant, wanting identity only to make it perfect," and the filing of the map of the line of the road and the withdrawal of the land "gave precision to the title and attached to it the" alternate sections designated by odd numbers within the twenty-mile limits. Until the withdrawal the grant was a float, but when the withdrawal had been made it ceased to be a float, and settled upon the alternate odd sections within the twenty-mile limits, but it did not settle upon, or touch, or affect in any manner the odd sections within the ten-mile or indemnity limits. In those sections the company acquired, and could acquire, no right or interest until it had built its road opposite to them and *it was then found* that there were not alternate odd sections sufficient within the

twenty-mile limits, not sold, &c., to satisfy the grant. Then the right of the company to seek indemnity within the ten-mile limits accrued, and not until then. And this right of selection did not and could not attach to itself any specific odd section within the ten-mile limits, until such section had been *selected* "under the direction of the Secretary of the Interior." At the time the land in controversy was so selected, it was no longer under the shadow of the Diaz claim; it was and had been for nearly two years public land, open to the selection of everybody, and the right of the company was equal to that of a pre-emptioner or homesteader.

In respect to the lands within the indemnity limits, this grant finds an analogy in the grant of the 16th and 36th sections, in each township, granted to the State of California for school purposes, by the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." (10 U. S. Stat., 244.) By the sixth section of that act, the 16th and 36th sections, in each township, were granted to the State for school purposes. By the seventh section it was provided: "That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, * * * which shall be subject to the approval of the Secretary of the Interior." The right of the State, under this grant, in the cases specified, to select lieu lands, is in all respects of the same legal complexion as that of the right of the railroad company, in this case, in respect to the selection of lieu lands within the ten-mile limits. Under the rule in *Lessieur* vs. *Price*, *supra*, the State can acquire no right whatever to lieu lands until they have been selected, and the selection approved by the

Secretary of the Interior. The State has a right to select any lands as lieu which at the time of the selection are public lands within the rule in *Newhall* vs. *Sanger*. In this case the railroad company had the same right, under the grant in question.

By an act of Congress of June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," there was granted "every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, *subject to the approval of the Secretary of the Interior*, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads." (1 Lester, 264; 11 Stats, 20.)

Here was a grant within six-mile limits, with a right to select lieu lands within additional limits of nine miles. It became necessary for the Department of the Interior to determine whether the right of the State to indemnity or lieu lands vested at the same time at which its right to the

granted lands vested, and it was decided that it did not. In making his decision the Secretary of the Interior used the following language:

"I am of the opinion, and so decide, that there has not been a vestiture of title in the State to the odd-numbered tracts *between* the six and fifteen mile limits of any part of the line of railroad. * * * *The grant has not been adjusted for quantity; the Governor has not selected specific tracts;* nor has the Secretary of the Interior, *as is prescribed by law, approved the lists of such selections.*"

1 Lester, 539.

So we say in this case, that until long after this Mexican grant was declared invalid, "there was no adjustment of this railroad grant for quantity; the company did not select specific tracts within the indemnity limits, and the Secretary of the Interior, *as provided by law*, did not approve any such selections." From all of which it appears that the land in suit did not become subject to the railroad grant until after it had been freed from this Mexican claim and all other claims, and, therefore, had fallen into the category of public lands as defined in *Newhall* vs. *Sanger*.

The foregoing decision of the Secretary of the Interior, it is true, was afterwards overruled by W. H. Smith, Acting Secretary of the Interior, (Copp, page 384, No. 403,) but it is submitted that the former decision is sustained by the better reason.

In conclusion upon this branch of the case, I desire to call the attention of this Court to the opinion of Judge Sawyer, of the court below, which will be found at page 20 of the record. This court will there find the argument, which I have attempted to make, more fully and more clearly presented.

II.

The rule in Newhall vs. *Sanger ought not, in any event, to be applied to this case.*

Should this court be of the opinion that the facts of this case do not distinguish it from *Newhall* vs. *Sanger*, I most respectfully beg leave to ask a reconsideration of the rule announced in that case, or at least that it be confined to the grant there construed, and not extended to the grant in this case. If the judgment in this case be reversed upon the authority of *Newhall* vs. *Sanger*, such reversal will result in mischief to many, and do no one any good. Nearly all of the odd sections which are within the Diaz claim, and also within the railroad grant, have been patented to the railroad company, and nearly all of these have been sold by the company to innocent purchasers, who have entered into possession, built homes and other improvements, and are now in the occupation and enjoyment thereof, believing their title to be founded upon what is generally supposed to be the best of foundations, to wit: a United States patent. Under the rule in *Newhall* vs. *Sanger*, the Interior Department assumes that these patents are invalid, and the Department of Justice, under direction of the Department of the Interior, has commenced a suit to set them aside in the circuit court of the United States for the district of California. Under such conditions I feel justified in asking a reconsideration of the rule in *Newhall* vs. *Sanger*.

The ground of the decision in *Newhall* vs. *Sanger* was that lands in California, lying within the exterior boundaries of lands claimed under an alleged Mexican or Spanish grant, were *reserved* lands within the meaning of the proviso or exception contained in the grant to the Western Pacific Railroad Company.

The exception contained in that grant is in these words:

"Not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

Pacific Railroad act, of July 1, 1862, section 3, 12 U. S. S., 492.

The amendatory act of July 2, 1864, also contains a limitation upon the grant, upon which much stress seems to have been placed by this Court. It is in the following language:

"And any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other *lawful* claim, nor include any *government* reservation or mineral lands, or the improvements of any *bona fide* settler, or (on?) any lands returned and denominated as mineral lands." * * *

Pacific Railroad act, of July 2, 1864, section 4, 13 U. S. S., 358.

The supposed reservation in question was created, in part, by an act of Congress, of March 3, 1853, entitled "An act to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," (10 U. S. Stat., 244,) and in part by the act of March 3, 1851, to ascertain and settle private land claims in California, (9 Stat., 631.)

The alleged reservation is grounded in part upon the following language, found in the 6th section of the act of March 3, 1853:

"SECTION 6. *And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, *or reserved by competent authority*, and excepting also the lands claimed under any *foreign grant or title*, and the mineral lands, shall be subject to

the pre-emption laws of fourth September, 1841, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided; * * *."

The words "reserved," and "reservation" have long since acquired a clear and well-defined meaning in all congressional legislation. From the first it has been the custom of Congress, either by direct action, or by the agency of some officer of the Government, thereunto duly authorized by an act of Congress, to set apart for various public uses—such as sites for forts, military and naval posts or stations, and dwelling places for the various tribes of Indians—portions of the public domain. Such lands have always been set apart for some designated and specific *public* use. From this practice of the Government the word "reservation" has acquired a meaning and significance which it did not previously possess. This peculiar meaning has been imported into American lexicons, and we find it expressed in an additional definition, to wit, "tracts of the public lands reserved for some specific use." (Webster.) These words also imply a setting apart of the land in question to the use of the Government of the United States, and not to the use of private persons.

When public lands are devoted to private uses it is not by the use of words of reservation, but by the use of words of grant, and when such lands are afterwards referred to they are not called "reserved lands," but "granted lands." This difference in the use of these words is clearly illustrated by the manner in which they are used in the railroad grant in this case: "And when any of said alternate sections, or parts of sections, shall be found to have been *granted*, *sold*, *reserved*, *occupied by homestead settlers*, *pre-empted*, or *otherwise disposed of*, other lands," &c. Here are six distinct classes of lands, neither of which includes either of the others. The first includes all lands which have been granted by the United States to States for internal improvements or for

school and seminary purposes, or to corporations for railroad and other purposes, or to natural persons as a reward or gratuity. The second embraces all lands which have been sold by the Government for a consideration, under any of its rules or regulations in respect to the sale of its public lands. The third embraces all lands which, by any act of Congress or of any officer of the Government, duly authorized by an act of Congress, have been selected from the body of the public land and appropriated to some *specific public use* of the *United States*, such as military, naval, postal, Indian, and other like uses, if there be any. The remaining three classes speak for themselves, and require no special introduction. There is still another class of lands which are frequently mentioned in acts of Congress. They are a class to themselves, and are no more included in one of the foregoing classes than one of them is included in some other of the number. The class referred to is "lands claimed or held by private persons under some foreign title." Such lands, if situated in California, are generally referred to as "lands claimed or held under a Spanish or Mexican grant or title."

The existence of this class of lands is as universally known as either of the others, and since they are entirely distinct from all other classes above enumerated in respect to title or mode of acquisition, it would be passing strange if Congress or any other legislative body, or any judicial body, should refer to them or speak of them by any other name than that by which they are universally known, and by which they are universally mentioned by all classes of men. Were A to speak to B of "reserved" lands, B would not for a moment suppose that A was referring to lands claimed or held under Spanish or Mexican grants, and so on to the end of the alphabet. This difference was well known to Congress, and there is no plausible ground for supposing that Congress has ever intended to refer to these lands by any other than the title which has not only been bestowed

upon them by common consent, but which has been incorporated into and become a part of the familiar legal nomenclature of all legislative and judicial bodies. It might be held that "pre-emption claim" includes a "homestead claim" with as much reason and propriety as that "reserved lands" include "lands claimed or held under a foreign grant or title, or under a Spanish or Mexican grant." The distinction which exists between the last two classes is as clearly marked and defined in the legal history of the country, as the distinction which exists between the first two classes. Examples are not wanting to show that this distinction has always been well understood and recognized by Congress whenever the occasion required.

In the act entitled "An act to establish the offices of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," approved July 22, 1854, reference is made to lands in New Mexico claimed under Spanish or Mexican grants. The first part of the act provides for making certain donations to actual settlers. It then takes up the subject of Spanish and Mexican claims, and directs that they shall be investigated by the Surveyor General, &c., and that he shall report his decision as to their validity or invalidity, and concludes as follows:

"And until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act." (10 U. S. Stat. 309, sec. 8.)

Another example is found in the act of March 3, 1853, extending pre-emption rights to certain lands in California, being the act upon which in part this supposed reservation rests. The sixth section of this act, which has been already quoted, and need not be here repeated, extends pre-emption rights to all public lands in California except certain classes of

lands which are specially mentioned, among which are lands "reserved by competent authority, and excepting *also* the lands claimed under any foreign grant or title." This last example clearly shows that Congress regarded "reserved lands" as constituting a description or class of lands entirely separate and distinct from lands claimed under Spanish and Mexican grants, for both are separately mentioned under separate and distinct titles.

Thus far I have attempted to show that it has not been the practice of Congress to refer to lands claimed under Spanish or Mexican grants as "reserved lands," but as constituting a separate and distinct class, which is always referred to by its own distinctive appellation whenever occasion requires that it should be referred to at all, or whenever it is intended to include or exclude it from the operation of any act of Congress. This has been done for the ultimate object of properly construing the railroad grants in *Newhall* vs. *Sanger*, and in the case at bar. But before discussing that question I desire to add a word or two in reference to the construction of the sixth section of the act of March 3, 1853.

In *Newhall* vs. *Sanger* this Court construed that section as placing Spanish and Mexican grants, whether valid or invalid, in the category of "reserved lands." This construction, I respectfully submit, is not sustained by any language contained in that section, or by any public policy which, as may be supposed, may have influenced Congress at the time that act was passed. It was not the intent of Congress to put such lands in the category of "reserved lands," but merely to *except* them from the operation of that act; that is to say, to provide that such lands should not be subject to pre-emption. An "exception" differs materially from a "reservation;" the former merely takes the matter excepted out of the body of the act, or the matter from which it is taken, and there stops; but the latter sets the matter reserved to one side for a special

purpose, where it remains unaffected by any subsequent legislation which does not relate to it specifically. Hence, by excepting Spanish and Mexican grants from the operation of the pre-emption laws, Congress did not except them from the operation of any other laws or grants which Congress might afterwards see fit to pass or make. Nor was there anything in any supposed public policy existing at that time, which would have been likely to influence Congress to exempt such lands from the effect of future legislation. On the contrary, there were many cogent reasons why they should not have been so exempted—the most cogent of which is, that under such an exemption or reservation *there would not have been a foot of land in the State of California subject to the disposal of the United States up to as late a date as the September term of this Court*, 1859, *or as late as* 1860.

On the 25th day of February, 1822, a grant of twenty leagues square, equal to four hundred square leagues, was made by the Government of Mexico to President Yturbide, to be located in Texas, "in recompense for his high merit in having achieved the independence of his country."

In 1835 the Congress of Mexico authorized his heirs to locate the land in New Mexico, or in Upper or Lower California. On the 20th of February, 1841, it was decreed by the President that the land should be located in Upper California. This claim was presented to the land commission within the time required by law and was *sub judice* on the 3d of March, 1853. (Yturbide's Executors *vs.* United States, 22 How., 290.) From this it resulted that at the time this act of Congress—of March 3, 1853—was passed, this Yturbide claim was in existence, and its *exterior boundaries were the same as the exterior boundaries of the State of California.* So at the time this act of March 3, 1853, was passed, under the rule of construction in *Newhall* vs. *Sanger*, there was not a foot of land in California upon which even the provisions of that act could take effect; and had the claim continued *sub judice* two years longer there would not have been a foot of land in the State

upon which the grant made in the Pacific Railroad act of July 1, 1862, or any other grants, could have taken effect. In this connection an interesting inquiry presents itself. If the rule in *Newhall* vs. *Sanger* is to be adhered to, what is the present status of all the lands in California which were granted for various purposes by the United States prior to the final rejection of the Yturbide grant in 1860—the grants for schools and seminaries, the grant of 500,000 acres for internal improvements, the grant of millions of acres of swamp and overflowed lands, and other grants which it is not necessary, for the present purpose, to mention? Under the rule in *Newhall* vs. *Sanger* the answer to this question is obvious. There was no public land in California at the time these several grants were made, and accordingly all such grants were when made, and still are, wholly void. Such, I respectfully submit, is one of the mischiefs which result from the construction adopted in *Newhall* vs. *Sanger*.

I now turn to the construction of these railroad grants. As already shown, they are absolute grants *in præsenti*, and passed to the grantees a perfect title to all the odd sections of public land therein mentioned, except such as fell clearly within the exceptions specified in the grants. In construing this exception in *Newhall* vs. *Sanger* this Court indulged in the utmost liberality, and, in doing so, I respectfully submit, violated a well-settled canon of statutory construction. Instead of being liberally construed this exception should have been strictly construed.

In *United States* vs. *Dixon* (15 Pet., 165,) Mr. Justice Story said that it was "the general rule of law, which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up

any such exception must establish it as being within the words as well as within the reason thereof."

It is very clear, that if I have correctly construed the sixth section of the act of March 3, 1853—as merely *excepting* Spanish and Mexican claims from the provisions of that act, and not as erecting them into a "reservation," which would exclude them from the operation of future legislation not specifically relating to them—under the rule above laid down by Mr. Justice Story, Mexican or Spanish claims are not included in the exception or proviso in question, but are included in the enacting clause; that is to say, in the grants made to these railroad companies.

This result is consistent with the manifest policy of Congress in making these railroad grants. The intention was to give the full quantity of land named; and to give it in as compact a body, along the line of the roads, as circumstances would permit. It was well known that these roads would pass through large tracts of land lying within the exterior boundaries of Spanish and Mexican claims, some of which were valid and others invalid; and that if the lands in the former, which would not be finally required to satisfy the claim, and all the lands in the latter, were not allowed to feed these railroad grants, there might not and would not be sufficient land within the limits of the railroad grants to satisfy them on the score of quantity. Under such conditions, and in the absence of any express, unmistakable exception, it must be held that Congress, so far as the United States had title, intended to subject these lands to the purposes of these railroad companies. There was no reason—at least no satisfactory reason has been suggested—why Congress should not so dispose of these lands. Such disposition could have in no respect impaired, or defeated, or tended to defeat any Spanish or Mexican claim to them. If such claims should be held to be valid, they would be accorded the proper quantity of land to which they were entitled, and the claim of these railroad companies would

be confined to the remainder. No conflict could arise and no complications ensue. In short, these lands, except such as might be finally surveyed and set apart for the Spanish or Mexican grantees, or their grantees, were and always had been public lands, and Congress had an absolute right to dispose of them in any manner it thought proper, and I respectfully submit that Congress saw proper to grant, and did grant, them to these railroad companies, so far as they fell within the calls of their grants.

Again. Thus far in my examination of the rule in *Newhall* vs. *Sanger* I have discussed it only so far as it rests upon or is deduced from the act of March 3, 1853. It does not rest upon or is not deduced solely from the provisions of that act. It is also grounded upon the act of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California." Referring to that act this Court said:

"It was not until March 3, 1851, that our Government created a commission to receive, examine, and determine them [Mexican claims.] As the operation of our land system, had it then been extended to California, would have produced the utmost confusion in titles to real estate within her limits, *it was wisely withheld by Congress until such claims should be disposed of.* The act of that date declared that all lands, the claims to which should not have been presented within two years therefrom, should '*be deemed, held, and considered to be a part of the public domain of the United States.*' This was notice to all the world that lands in California were held in *reserve* to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the commission."

In this, I respectfully submit, the wrong motive, purpose, and intent were attributed to Congress. It was not the intention of Congress, by the use of this language, to *reserve* these lands for the purpose of enabling claimants to maintain their rights before the land commission, or to except them from the operation of general or particular laws for

the period of time stated. This clause was intended to operate as a *statute of limitation*, and to bar forever the right of these claimants after the expiration of two years. That time, it is true, in one sense, was allowed to them in which to present their claims, for without the allowance of a reasonable time for that purpose the act would not only have been in violation of treaty obligations, but also in violation of the law of nations and the Constitution of the United States; but the true purpose of the clause was to *bar these claims after two years*. That such was the sole purpose of this language becomes obvious upon a moment's reflection. Had Congress intended a *reservation* of lands in California it would not have limited the reservation to two years. There was not the remotest possibility of all these claims being presented, litigated, surveyed, and patented within two years.

The labors of the land commission continued for four years, and the ascertainment and settlement of these claims has been a fruitful source of litigation in the courts since, and is not yet terminated. These results were obvious to every one at the time the act was passed, and had the reservation of lands been intended, it would have been continued until all the purposes of the act had been accomplished. To continue it for two years, and then withdraw it, would have been absurd. Whatever necessity there may have been for it, that necessity certainly did not cease, or would not cease, at the expiration of two years. Besides, it was well known that California was covered with these claims—treating them as extending to their exterior boundaries—and hence that such a reservation would prevent the settlement of the entire State, and prevent the United States from appropriating or disposing of a foot of land within her borders. In view of these conditions, it is not probable that Congress intended this alleged reservation. Congress made no express reservation. If there be one, it rests merely upon a shadowy implication. It is hardly to be presumed that Congress

would have allowed so important a question to rest upon a doubtful implication. It would have expressed its intent in unmistakable language, as it did in the case of New Mexico, hereinbefore referred to. If such a course was thought proper and was intended, Congress certainly failed to express its intention in apt or even appropriate language. Besides, the most extraordinary condition which existed in California, in respect to the *status* of lands, instead of suggesting such a course, would, as it seems to me, have suggested a course directly opposite. Comparatively small tracts were claimed within exterior boundaries of vast extent, embracing, as already shown, the entire State, and to reserve the entire State (to satisfy such claims) from any disposal whatever by Congress, would have been unnecessary, unjust, and an obstruction to the progress of the State.

Again. It is said, in the foregoing quotation, that Congress wisely withheld these lands from the operation of the land system of the United States. This is said in respect to the effect of the act of March 3, 1851. Is this historically true? The meaning and the statement is that our land system had not then been extended, and was not extended, to California until March 3, 1853. The United States, in respect to extending its laws to California, pursued the usual course, or if there was any departure from the usual course, such departure was in the direction of more favorable and liberal views toward settlers.

As early as September 28, 1850—19 days after the admission of California into the Union—Congress enacted: "That all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within said State of California as elsewhere in the United States." (9 Stat., 521.)

In the "act making appropriations for the civil and diplomatic expenses of Government," &c., chap. 32, approved

March 3d, 1851, is found the following clause, (9 Stat., p. 617:)

"For surveying the public lands and private land claims in California, in conformity with the provisions of the acts of Congress authorizing similar surveys, TWENTY-FIVE THOUSAND DOLLARS, to be expended under the direction of the Department of the Interior; out of which sum is to be paid the compensation of a surveyor general, whose salary shall not exceed four thousand five hundred dollars," &c., &c.

Under this law a commission was issued March 12, 1851, to Samuel D. King, as surveyor general of California, who gave bond and took the oath of office March 29, 1851. Mr. King went to work promptly and vigorously. A large amount of work on the public surveys in California was performed, which, it appears, was continued the following year.

Appropriations were made by act of 31st August, 1852, (10 Stat., pp. 90–91,) viz:

"For sub-dividing lands in California into townships, equal to two thousand seven hundred miles of surveying, at a rate not exceeding fourteen dollars per mile, thirty-seven thousand eight hundred dollars."

"For sub-dividing one hundred and fifty townships in California into sections, at a rate not exceeding twelve dollars per mile, one hundred and eight thousand dollars."

"For extending surveys in California through the mineral region, twenty thousand dollars."

"For surveying private claims in California which may have been presented in good faith to the board of land commissioners, twenty-two thousand five hundred dollars: *Provided*, That the authority hereby conferred on the surveyor general shall apply only to such unconfirmed cases as in the gradual extension of the public surveys he shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance of confirmation."

A few months after this last act, viz.: March 3d, 1853, a statute was enacted modifying the surveying and pre-

emption laws, in their application to the public lands in California, adapting them to the peculiar facts of the case—the unusual manner of the settlement of the State, and the mineral lands and private land claims therein—providing for the appointment and official terms of land officers, and making grants to the State for schools, internal improvements, public buildings, and a university.

By said act of March 3d, 1853, sec. 6, it was provided that the public lands in California should be subject to the pre-emption laws, with modifications and conditions prescribed. The act of 1841 restricted settlements to surveyed lands, and the pre-emption right to a single entry of not exceeding 160 acres. Under this act of 1853 settlements were allowed on unsurveyed lands, and a previous pre-emption elsewhere was no bar to obtaining another entry in California. This act contained a grant of two entire townships, or seventy-two sections, to the State for the use of a seminary of learning, to be selected by the Governor of the State, and also a further grant of ten entire sections for the purpose of erecting the public buildings of the State, to be selected by the Governor of the State, and also a further grant of the 16th and 36th sections in each township, for the purpose of public schools therein, and further provided that in case said sections had been or should be settled upon by the erection of a dwelling house, or the cultivation of any portion of the land, before the same should be surveyed, other lands might be selected by the proper authorities of the State in lieu thereof.

The foregoing grants were all made while the supposed reservation in question was still unrepealed, and in the very act which, as alleged, continued that reservation in force, and some of them were of specific tracts. In addition, the grant of five hundred thousand acres for internal improvements, made by the 8th section of the act of September 4, 1841, took effect, in respect to California, on the 9th of September, 1850, the day of her admission into the Union.

And lastly, in this connection, on the 28th of September, 1850, nineteen days after the admission of the State into the Union, all the swamp lands in the State were granted to her by the act of that date entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits."

In view of all the foregoing legislation in relation to lands in California, following in rapid succession, commencing before and continuing after the passage of the act of March 3, 1851, to settle land titles in California, (in which this alleged reservation is found,) I respectfully suggest that this supposed *wisdom* of Congress in reserving all the lands of California from disposal by Congress, while Mexican claims could be ascertained and settled, becomes gradually imperceptible. I therefore respectfully submit that the doubtful implication upon which this alleged reservation rests, so far as it rests upon the act of March 3, 1851, is effectually overcome by the force and effect of the foregoing historical facts. Instead of showing that Congress did not intend to meddle with or dispose of lands in California until after Mexican claims had been ascertained and settled, these historical facts show an intent directly opposite. They show that Congress pursued, in respect to the lands in California, the usual course. It made grants of them—some specific and others to be selected by the State—both before and after this alleged reservation. It proceeded promptly with the public surveys and as soon as they had progressed sufficiently to justify the appointment of land officers for the disposal of public lands, the special provisions of the act of 1853 relative to, and enlarging the pre-emption privilege, were enacted—provisions more liberal towards settlers than had ever existed before, and adapted to the peculiar condition of the country so as to secure a more rapid settlement and development of the public lands. To secure the rapid settlement of the country, and not to prevent it, was the policy of Congress. The former, and not the latter, if either, entitles Congress to

the appellation of "wise," which this Court has bestowed upon it in *Newhall* vs. *Sanger*.

In conclusion, it is due to myself and to others to say that much of the foregoing argument has been borrowed from the opinion of Mr. Justice Field in *Leavenworth &c., R. R. Co.* vs. *United States* (2 Otto, 753,) from the opinion of Judge Sawyer in this case, (record, page 20,) and his opinion in *Sanger* vs. *Sargent*, which will be found as an appendix to this argument. To all of these opinions the attention of the Court is earnestly invited. In thus acknowledging the sources from which my argument has been chiefly taken, I am satisfied I shall not substract from, but add to, its weight.

Respectfully submitted,

S. W. SANDERSON,
For Appellee.

APPENDIX.

IN THE CIRCUIT COURT OF THE UNITED STATES, OF THE NINTH JUDICIAL CIRCUIT, DISTRICT OF CALIFORNIA.

CHARLES W. SANGER *vs.* R. C. SARGENT, ET AL.

1.—CENTRAL PACIFIC RAILROAD GRANT, A PRESENT GRANT.—The grant of alternate sections of land to the Central Pacific Railroad Company, under section 3 of the act of Congress of July 1, 1862, (12 Stat., 492,) is a *present* grant of the number of sections designated, which became specific and attached to every alternate section subject to grant lying within the prescribed limits, as soon as the line of road became "definitely fixed."

2.—SAME.—The grant having attached to the alternate sections the moment the line of the road became "definitely fixed," could only be defeated by a failure of the grantee to perform the conditions subsequent of building the road within the time, and in the mode, prescribed.

3.—MEXICAN GRANTS—RESERVED LANDS.—The fact that some of the alternate sections within the prescribed limits of the grant, at the time the line became "definitely fixed," were situate within the exterior limits of land claimed under an invalid Mexican grant, does not constitute such lands "reserved" lands, within the meaning of that term, as used in said section 3 of said act.

4.—SAME.—Lands lying within the exterior boundaries of land claimed under an invalid Mexican grant, were a part of the public domain of the United States on July 1, 1862, and were not, by reason of such claim *only*, within any of the exceptions mentioned in the act of Congress of that date, or of any of the acts supplementary thereto, granting lands to aid in the construction of the Pacific Railroads; and the alternate sections of such lands, lying within the prescribed limits, to which no other right had attached at the time the line of the road became "definitely fixed," were within the terms of the grant to the railway company, and the title thereto became irrevocably vested in said company upon the performance of all the conditions prescribed by said several acts.

5.—Mexican Grant—Proceedings for Confirmation.—A decree rejecting a claim to lands under a Mexican grant in proceedings had for a confirmation under the act of 1851, to settle land titles in California, is an adjudication between the claimant and the United States, that the claimant had no title, legal or equitable; and that, as to said claim, the land was always a part of the public domain of the United States from the date of its cession by Mexico.

6.—Patentee when Trustee for Another.—Where the right to lands vested in the Central Pacific Railroad Company, and its assignees, under the act of Congress of 1862, to provide for the construction of the Pacific Railroads, and a patent to the same has been subsequently wrongfully issued to another party, a court of equity will convert the patentee in such patent into a trustee for the party in whom the right vested under the act, and compel him to convey such title as he acquired by the patent.

Sawyer, Circuit Judge:

The complainant filed his bill in equity against the defendants for the purpose of establishing his right to certain lands, which have been patented by the United States to the defendants, and procuring a decree for the conveyance of such title as passed by virtue of the patents. The complainant claims to be entitled to the lands by virtue of certain acts of Congress, and transactions thereunder set out in the bill, and he alleges that defendants, notwithstanding his right to the lands, have wrongfully procured patents to be issued to themselves. The defendants demur to the bill, and the question to be determined is, whether the facts alleged taken to be true, entitle complainant to the relief sought. According to the allegations of the bill, complainant has acquired by proper mesne conveyances all the right, title, and interest vested in the Central Pacific and Western Pacific Railroad Companies, under the acts of Congress granting lands to said corporations to aid in the construction of the Western Pacific Railroad. The right of the complainant depends upon whether the said corporations under which he claims, acquired a right to the land under the acts of Congress set out in the bill. Section 3 of the act of July 1, 1862, "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," etc., provides as follows:

"That there *be* and *is hereby granted* to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, *every alternate section* of public land, *designated by odd numbers*, to the amount of *five alternate sections per mile on each side of said railroad*, on the line thereof, and within the limits of ten miles on each side of said road, *not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.*" (12 Stat., 492.)

That this section constitutes a *present* grant of the number of sections mentioned, which becomes definitely attached to the specific alternate sections situate within the limits prescribed in the act, not reserved, or excepted by virtue of the words of reservation or exception, as soon as "the line of said road is definitely fixed," there can be no doubt. This is both clearly apparent from the language of the act itself, and is thoroughly settled by judicial construction in many cases wherein the language is precisely similar. (Doll *vs.* Meader, 16 Cal., 315; Van Valkinburg *vs.* McCloud, 21 Cal., 335; Higgins *vs.* Houghton, 25 Cal., 255; Bludworth *vs.* Lake, 33 Cal., 261; Chapman *vs.* School Dist. *et al.*, 1 Deady, 108; Lamb *vs.* Davenport, 1 Sawyer, 632; Cent. Pac. R. R. Co. *vs.* Dyer *et al.*, 1 Sawyer, 652; Lessieur *vs.* Price, 12 How., 75–6; Foley *vs.* Harrison, 15 How., 446, 591; Railroad Co. *vs.* Smith, 9 Wall., 99, 100, 97; Railroad Co. *vs.* Fremont County, 9 Wall., 94–5.)

This grant could only be defeated by a failure to perform the conditions of building the road as prescribed. When the line of the road became "*definitely fixed*" in the mode prescribed, the right of the railroad companies under which complainant claims, attached to every alternate section of the public land within the limits prescribed of ten miles on each side of the road, which was not mineral lands, had not at that time been "sold, reserved, or otherwise disposed of by the United States," and to which a pre-emption or homestead claim, or some other right under the statutes, had not attached. A subsequent act extended the grant to *ten*, instead of *five*, sections, to be selected within *twenty* miles on each side of the line, and defined the exceptions in more specific terms, which in no way affect the question at issue. Upon the filing by the company of a map designating the general route of the road, the acts with the amendments, also authorized the Secretary of the Interior to withdraw the land within 25 miles of such designated route from pre-emption, private entry, or sale. The bill alleges that said map was filed, designating the general route, October 5, 1864; and that on December 1, 1864, the Secretary of the Interior withdrew the lands within 25 miles of the route so designated from pre-emption, private entry, or sale.

The bill avers that the lands in question are within the prescribed limits; were, at the time of the said withdrawal, and, "*at the time when the line of the said road was definitely fixed*" public lands of the United States, and were alternate sections designated by odd numbers, and not within any of the said exceptions mentioned in any of the said acts. If this be so, then, the right of the company vested and became perfect, and it was entitled to a patent upon fulfilling the prescribed conditions, and no other party could acquire any right under the laws in force against the said railroad corporations, after the line of the said road became "definitely fixed," and the grant had become thus attached to these specific tracts. (See cases before cited.)

The only ground upon which it is claimed that these lands are within the exception, and, therefore, excluded from the grant, is, that they had been "*reserved.*" The bill alleges in direct terms that they had not been reserved. The bill, however, makes the further allegation, that the *only* reason that patents were not issued to complainant was, "that at the date of the final location of the road, there was a claim to said land, under a Mexican grant, which said claim was without any foundation, and was wholly void, and was finally rejected by the Supreme Court of the United States in December Term of 1864, long before said portion of said road was completed that gave the right to the said lands; and the said Mexican claim was rejected because the alleged grant on which the claim was founded, was a fraud, and was absolutely void." That it was pretended by the officers of the Government, "that the fact of said lands being so claimed, made them '*reserved*' under the act of Congress, whether said claim was just or unjust, legal or illegal, and that on this account alone," the issue of a patent to complainant was refused. This allegation presents the only other question in the case on the merits, viz: whether the mere fact that the lands in question at the time of the filing of the map required; the time of the withdrawal from preemption, private entry or sale; and the time of the final location of the line of the road, were within the exterior boundaries of a tract claimed under a Mexican grant, whether fraudulent or genuine, of itself constitutes them *lands* "*reserved*," within the meaning of the section making the grant. It does not appear, and it is not claimed, that before said definite location, or at any time, there was, in fact, any actual order of the President, or of any department, or officer of the Government, authorized to make one, made, reserving these specific lands, or any lands within the external boundaries of this pretended grant.

That the lands were public lands there can be no doubt. The fact that they were claimed under a fraudulent and invalid Mexican grant, did not prevent them being public lands. The final rejection of the grant did not change the ownership of the lands from the claimant to the United States. It was only an adjudication—a judicial determination—that the grant was invalid, and that the claimant never had any right whatever, legal or equitable, entitled to recognition under the treaty with Mexico; or, in other words, an adjudication in a litigation between the only party setting up any claim, and the United States, that the entire title was in the United States; and that the lands were *public, not private,* lands. There being no right or title to these lands in any private individual, the proposition that they were always a part of the public domain, or public lands of the United States, from the time of their cession by Mexico, seems to be so clear, that no argument can make it plainer. If a confirmation relates to, and takes effect from, the date of the filing of the petition, or the date of the grant, as held in many cases, a rejection must have the same relation. But there is no occasion to apply the doctrine of relation. Being public lands they were subject to grant, and were granted, unless within some one of the excep-

tions made in the granting act. It is not pretended that they are within any exception, unless it be under the head of "reserved" lands.

As before stated, it is not pretended that there was any specific order by any competent authority reserving these lands, or any lands embracing these, or that they are reserved at all unless by force of some statute without any further act by any department or officer of the Government. No statute has been called to my attention, reserving them in express terms from this grant to the railroad, in consequence of their being within the external limits, or otherwise, of an invalid Mexican grant. The word "reserved," itself, as used in the railroad acts, does not profess to point out what lands are reserved, within the meaning of the act. It does not attempt to *define* "reserved" land. It does not include any lands not reserved already by other acts, or other words or provisions than the word itself. In other words, we must go outside of that word, "reserved," as there used, to other acts to find the lands intended to be designated by it. And, going outside of this word, I have been referred to no statute, and I have not found any that appears to me to reserve these lands from grant. I find nothing in the act of 1851 to settle private land claims in California, reserving any lands of the United States from any grant that Congress may see fit to make. So far as I am aware that act is the first one passed affecting the titles to lands in California. There were no public lands at that time open to sale or pre-emption in the State of California. There were at that time no means by which private rights not already vested or initiated under the laws of Mexico, could be acquired in any of the public domain of California. As the said act did not provide for any disposition of the public lands, other than to ascertain what grants had already been made by the Mexican Government, and to perfect the rights inchoate, or otherwise, in the said grants, and there was no other law by means of which any pre-emption or other rights could be acquired in the public lands in California, and the President having the power already to reserve any land for the Government's specific uses, there was no occasion for making any general reservation in that act to avoid further complications, and none was made. The whole scope and purpose of the act was to ascertain what lands belonged already to private parties, and what to the public domain; and this object must be kept in view in its construction. The disposition of the public lands to private parties was left for future legislation.

The next act, so far as I am advised, affecting the public lands in California, is in the appropriation made for the survey of the public lands in that State, in 1852. (10 Stat., 90–1.) This act authorizes the dividing of a certain amount of the public lands into townships and sections. Also, the survey of private claims under Mexican grants presented in good faith for confirmation. But it only authorizes the survey of such *unconfirmed* grants "*as the gradual extensions of the lines of the public surveys as he (the surveyor general) shall find within the immediate sphere of his operations, and which he is satisfied ought to be respected and actually surveyed in advance*

of confirmation." What does this mean? Certainly not that all lands within the exterior boundaries of a Spanish grant shall be reserved from survey, or reserved at all. On the contrary, it expressly authorizes the surveyor general, when, in extending the lines of the public surveys, he comes upon an unconfirmed Spanish grant of the usual kind, which he is satisfied is good, and ought to be respected, to survey it "in advance of confirmation," in order that he *may survey as public lands the surplus, after satisfying the grant*, and thus prepare it for sale as soon as Congress should see fit to authorize its disposition. Congress had no idea, in passing this act, that all lands within the exterior boundaries of a grant, which sometimes embraced ten times the amount of land required to satisfy the grant had been reserved for any purpose, and certainly, up to this time, there had been no such reservation.

The act of March 3, 1853, "to extend pre-emption rights to certain lands therein mentioned," (10 Stat., 244,) clearly has no application. It had reference to prior legislation applicable to lands in the older States. There was nothing, at the time of the passage of the act, in California, to which it could apply. But afterwards, on the same day, the next act was passed by Congress relating to lands in California—the act of March 3, 1853, "to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes, (10 Stat., 244–8.) This appears to be the first act under which rights in the public lands, as against the United States, could be originally acquired, and this act relates to this specific subject-matter, and covers and disposes of the entire subject for the present. Section 6 of this act extends the right of pre-emption to California, and excepts from the right of "*pre-emption* lands claimed under any foreign grant or title." But this act makes no exception of such lands, as such, from any other grant that Congress may afterwards see fit to make. Its exception only applies to *pre-emption*, and other rights to be acquired *under that act*. Besides, the act itself, clearly shows that lands claimed under Spanish grants are not intended by Congress to be included under the head of "*reserved*" lands; for the language of this act is, "with the exception of lands * * * * *reserved by competent authority*," and then adds, "and excepting *also the lands claimed under any foreign grant or title.*" If it had been supposed that the lands within the exterior boundaries of a Spanish grant would be included in the words "reserved by competent authority," the last clause would have been useless. It was not so supposed, but it was intended to add something else. The word "and" indicates some additional lands. The other word, "also," as its definition indicates, shows, too, that there was to be something "further," something "in addition to" the lands already included in the word "reserved," excepted from pre-emption rights; and these further or additional lands were "lands claimed under any foreign grant or title." All these lands were excepted from the operation of *the pre-emption laws*. They were not reservations. There is a clear distinction between reservations and exceptions. Reserva-

tions in the sense here used are clearly, "tracts of the public lands reserved for some specific use," (Webster's Dic.,) such as for forts, military purposes, Indians, and the like, or lands reserved generally *in express terms.*

All reservations of this kind, and also lands claimed under Mexican grants, were alike "excepted" from the operation of the pre-emption laws. Lands reserved by competent authority were excepted, and so were lands claimed under Spanish grants *excepted*, not *reserved.* So, in like manner, under the railroad acts in question, the term "reserved," is manifestly used in the same sense, and all lands so "reserved," sold, or otherwise disposed of, all lands to which a pre-emption or homestead right had attached, *were excepted* from the operation of the grant.

The act of Congress in relation to Mexican grants *in New Mexico*, also provides that: "Until the final action of Congress on *such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act.*" (10 Stat., 309, Sec. 8.) This is as specified on this point as the act extending pre-emption rights to California.

Thus it is apparent that whenever Congress designs to except from the operation of any legislative grant, or reserve from sale, those portions of the public lands lying within the bounds of any tract claimed under a Mexican grant, it has no difficulty in finding and using apt language to express the intent clearly and explicity; and with these *former acts* before that body, it can hardly be supposed that Congress would have failed to use appropriate words to exclude this class of lands in the railroad grants, had such been the design. I have mentioned the only acts relied on, and they are the only ones I have found, from which a statutory reservation can be deduced, independent of any specific order by some officer of competent authority reserving the lands. It is not pretended that there is found any express reservation in either, or all, of these acts; and to my mind none can be implied by any reasonable construction.

Besides, I find nothing in the policy of the grant that would justify any such strained construction or implication. The policy of the act was, to give to the railroad company every alternate section of the public domain within ten miles on each side of the road, to which no private right had attached, and not already appropriated to some specific public use, to aid in the construction of this great public improvement. The donation was designed to be, and was, liberal. If reservations of this kind could be worked out by shadowy implications, in extended sections of the country, there would be no land granted, and no aid thereby conferred. This grant is to receive a reasonable construction, in view of the public object to be accomplished; and so construing it, it is obvious, that the act granted everything within the general descriptions not taken out by specific enumeration. And the lands in question are, in my judgment, clearly, not within the meaning of any one of the classes enumerated. The railroad act does not define its exceptions by reference to the pre-emption laws as a test. It names specifi-

cally each class intended to be excluded, and each has a subject matter upon which it can clearly operate, without embracing lands of the class in question. I am satisfied that the lands in question are within the grant to the Central Pacific Railroad Company.

The Central Pacific Railroad Company having filed its assent to the act, in pursuance of the provisions of section 7, it was not necessary for the Western Pacific Railroad Company to repeat it after the assignment. Whatever rights the Central Pacific Railroad Company had acquired, passed to the Western Pacific Railroad Company by the assignment and confirmation thereof, by the subsequent acts of Congress. Wherever any of the conditions prescribed by the acts of Congress had been duly and fully performed by the Central Pacific Railroad Company before the assignment, the rights thereby acquired enured to the benefit of its assignee, the Western Pacific Railroad Company, and it was not necessary for the latter to perform them again. But this, and other objections of a technical character made at the argument, worthy of any serious consideration, have been obviated by the amendments recently filed by leave of the court. It is true, that the bill, as now amended, does not aver the precise time when the line "became definitely fixed," but it does aver that no right had attached at the time it became "definitely fixed." This is the controlling fact, and I think it sufficient.

Upon the allegations of the bill, I am satisfied, that the right to patents to the lands in question vested in the complainant's grantors, and that the patents thereto in question, were wrongfully issued to defendants. Upon well-settled principles of equity jurisdiction, "where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title." (Stark *vs.* Starrs, 6 Wall., 419; Silver *vs.* Ladd, 7 Wal., 228; Garland *vs.* Wynn, 20 How., 6; Lindsey *vs.* Hawes, 2 Black, 554; Johnson *vs.* Towsley, 13 Wal., 73; Bludworth *vs.* Lake, 33 Cal., 261; Salmon *vs.* Symonds, 30 Cal., 306; Wasley *vs.* Foreman, 38 Cal., 91.)

This is a case within the principle. The demurrer must be overruled, and it is so ordered, with leave to answer on or before the next rule day.

Rendered September 16, 1874.

Jany 4. 78. Rec'd N. H. Swayne

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

MICHAEL RYAN, APPELLANT,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, APPELLEE. } No. 983.

MEMORANDUM AND BRIEF ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

MICHAEL RYAN, APPELLANT,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, appellee. } No. 983.

MEMORANDUM AND BRIEF ON BEHALF OF THE UNITED STATES.

On October 15, 1878, the United States commenced a suit in the circuit court of the United States for the district of California to set aside and have cancelled a patent issued to the appellee, in the above-entitled case, March 17, 1875, to the extent of about twenty thousand acres of land, including the tract in question in this suit.

This case has been brought into this court since the suit above mentioned was commenced by the United States, two of the officers of the appellee becoming bondsmen for the appellant.

The questions involved in the case are of great importance to the government, involving the right to large quantities of land, if the court shall find it necessary in deciding it to pass upon all of the questions raised by the counsel for the appellee in his brief.

The United States does not, and cannot, admit that the agreed statement of facts is true in at least one important particular, viz: That on October 30, 1874, "the alternate sections of lands within the twenty-mile limits mentioned in said act of Congress of the 25th of July, 1866, not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, were insufficient to satisfy the grant made in said act to said California and Oregon Railroad Company."

For the foregoing reasons the intervention by the United States in the case was asked and obtained. We shall undertake to show that the appellant is not now, and never has been, in a position to ask for and claim any relief from a court of equity in this case; and, in view of the matters above-stated, shall ask that the bill de dismissed, not on the ground stated by the court below, but on the points hereinafter mentioned, without considering or passing upon any questions not absolutely necessary for a decision in the case.

CASE.

This is a suit in equity, to restrain the defendant as the successor of the California and Oregon Railroad Company from using as evidence a patent issued to it by the United States for the tract in question, March 17, 1875, under an act of Congress approved July 25, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon." (14 Statutes, 239.)

The facts agreed upon by the parties to the record show that the plaintiff was qualified, on July 14, 1876, to enter a tract of land, subject to entry under the provisions of the homestead law; that on that day he applied to the register and receiver of the United States land-office at Marysville, Cal., to enter the tract in question, filed the necessary affidavit, paid said officers the lawful fees, and received from them a duplicate receipt showing his entry thereof; that afterward said plaintiff built a house upon said land, into which, with his family, he moved on November 4, 1876, where he has since resided, cultivating said land; that said tract is within the ten-mile indemnity limits of the grant made by Congress to the company of which the defendant is the successor; that at the date of the grant to the first company, the tract in question was within the claimed limits of an alleged Mexican grant, known as the Manuel Diaz grant, which grant was finally rejected by the Supreme Court of the United States, March 3, 1873; that on October 30, 1874, the alternate sections of land within the twenty-mile limits, mentioned in the

grant to the first company, not granted, sold, reserved, or occupied by homestead settlement, pre-empted, or otherwise disposed of, were insufficient to satisfy the grant to said company; that thereupon, October 30, 1874, the defendant selected the tract in question with other tracts to make up such deficiency, and applied for a patent of the tract so selected; that the selection of this tract was ultimately approved by the Secretary of the Interior, and a patent issued to the defendant therefor, March 17, 1875; and that at the date of said selection by the defendant the tract in question was public land.

On the foregoing statement of facts the plaintiff claims that the patent issued to the defendant is invalid as to the tract in question, and that the defendant should be restrained from exercising any control over it.

The defendant claims that the patent is valid, and that the suit should be dismissed.

ARGUMENT.

I.

THE BILL SHOULD BE DISMISSED.

From the agreed statement of facts, it appears that the patent for the land in question was issued to the defendant, and was delivered to and accepted by it more than a year prior to the time the appellant initiated, or attempted to initiate, his claim thereto.

This we shall urge is a sufficient ground for dismissing the bill of complaint, for the reason that the appellant is not entitled to the relief prayed for by him, even in a court of equity, for the following reasons, viz:

1. By the issuance and delivery of a patent of a tract

of land, by the United States, and its acceptance by the patentee, the legal title to said tract passes to the grantee, and until said patent is set aside by a court of competent jurisdiction it is conclusive against the government and all junior claimants thereunder. (United States *vs.* Stone, 2 Wallace, 525; Meader et al. *vs.* Norton, 11 Wallace, 442.)

2. A court of equity will set aside a patent obtained by fraud, or through the mistake or inadvertence of the officers of the government, on a bill filed by the government for that purpose. (Hughes *vs.* United States, 4 Wallace, 232.)

The bill, however, must be filed and the case prosecuted by the government. (Field *vs.* Seabury *et al.*, 19 Howard, 323; Biddle Boggs *vs.* Merced Mining Company, 14 California, 365–6.)

3. But courts of equity will not permit a party who made his entry subsequent to the issuance of a patent to assail said patent, although they will grant him relief if his right to the land therein described antedated the right of the patentee therein mentioned. (Hoofnagle *vs.* Anderson, 7 Wheaton, 212; Johnson *vs.* Towsley, 13 Wallace, 72; Silver *vs.* Ladd, 7 Wallace, 219.)

In the case of Hoofnagle *vs.* Anderson, a case in some particulars quite analogous to the case at bar, Mr. Chief Justice Marshall said:

"The title of the respondent to the particular tract included in his patent was complete before that of the appellant commenced. It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the emanation of title, and have sustained a valid entry against a patent founded on a prior

defective entry, if issued after such valid entry was made. They have gone no farther. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. The patent appropriates the land it covers, and that land being no longer vacant, is no longer subject to location. If the patent has been issued irregularly the government may provide means for repealing it; but no individual has the right to annul it, and consider the land as still vacant, and to appropriate it to himself. * * * The principle is well settled, in other cases, that the patent is unassailable by any title commenced after its emanation, and we perceive no sufficient reason against applying the principle to this case."

4. "Unappropriated public lands" are the only lands which can be entered under the homestead law. (Section 2289, Revised Statutes.)

If the land in question, therefore, was appropriated by being included in the patent issued to and accepted by the defendant, the so-called entry of the same by the plaintiff was unauthorized, and gave him no rights therein on which to base a claim for the consideration even of a court of equity. The allowance of the entry by the local land officers was unauthorized, and gave the plaintiff no right to the tract, for if with the issuance and delivery to and acceptance of a patent by the defendant for the tract in question the title thereto *prima facie* passed to the defendant, and the executive department having control of the sale of the public lands thereby lost such control until said patent was set aside and canceled by a court of competent jurisdiction, certainly the lowest subordinate officer of that department could not give the plaintiff any right thereto by allowing him to enter the same, although he was duly qualified to enter a tract subject to entry, and made the

necessary application and affidavit required by law, and paid to such officers the legal fees. The right to sell and the right to enter must both exist at the same time. (Moore *vs.* Robbins, 6 Otto, 530.)

Neither the local officers nor the appellant had the right to treat the patent issued for said tract as void, although it may be voidable under the decision of this court in the case of Newhall *vs.* Sanger. A decision that a patent is invalid to a certain tract of land does not adjudicate the invalidity of patents to other tracts of land, although issued in pursuance of the same law and upon the same state of facts. There must be an adjudication in each specific case, and until such an adjudication is had the patent is *prima facie* evidence of a good title, and appropriates the land.

If a court of equity will not grant relief to a party whose claim to a tract of land was initiated after said tract had been patented to another, and while said patent is outstanding and uncanceled, or if the court shall find that the tract in question had been appropriated, and was not therefore subject to entry by the appellant at the time he applied to enter the same, we respectfully submit that this bill of complaint should be dismissed, without passing upon the questions raised by the defendant's counsel in his brief, as to the applicability or inapplicability of the decision of this court in the case of Newhall *vs.* Sanger to this case, or the correctness or incorrectness of the principles therein announced.

If the court, however, does not agree with us on the foregoing propositions, and deems this a proper case in which to pass upon the validity of the appellee's patent to the tract in question, then we desire to submit for the

consideration of the court some reasons why said patent should not be sustained, and why the decision in the case of Newhall *vs.* Sanger is applicable to this case.

In so doing we are compelled to call the attention of the court to some facts which do not appear in the "agreed statement of facts," in order that the court may fully understand our reasons for not considering the patent valid.

II.

THE PATENT INVALID.

It was agreed by the appellant (although we deny his authority to bind the United States) that on October 30, 1874, "the alternate sections of land within the twenty-mile limits mentioned in said act of Congress of the 25th of July, 1866, not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, were insufficient to satisfy the grant in said act to said California and Oregon Railroad Company."

If the fact therein sought to be established is true, it is entitled to great weight in determining the validity of the patent issued. But is it true? If it is true, it should appear on the list of selections on which the patent issued. An examination of that list, however, does not disclose the fact that any tract of land had been lost to said company within what is termed the "granted limits," in any of the ways specified in the granting act. (See Exhibit A.) Neither does it appear from said list and accompanying papers, that the company at that time claimed that any tract had been thus lost.

If it be said that the officers whose duty it was to determine whether a tract had been lost to the company approved the list, and, therefore, must have found, as

required by the granting act, that a loss had occurred, we answer that there is no evidence, nor has there ever been any evidence on file in the Interior Department other than the list and accompanying papers, on which such decision could have been made, and we, therefore, claim that the patent was erroneously issued.

The company was not entitled by the terms of the grant to indemnity for all lands not found in place within the granted limits. In the case of the Leavenworth, Lawrence and Galveston Railroad Company *vs.* United States (2 Otto, 748–9), this court in construing the indemnity clause of the grant then under consideration, which, in all essential particulars, is the same as the one now under consideration, said:

"The indemnity clause has been insisted upon. We have before said that the grant itself was *in presenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but as soon as this was done it was easy to find them. If the company did not obtain all of them within the original limit, by reason of the power of sale or reservation retained by the United States, it was to be compensated by an equal amount of substituted lands. The latter could not, on any contingency, be selected within that limit; and the attempt to give this effect to the clause receives no support, either in the scheme of the act or in anything that has been urged by counsel. It would be strange, indeed, if the clause had been intended to perform the office of making a new grant within the ten-mile limit, or enlarging the one already made. *Instead of this, the words employed show clearly that its only purpose is to give sections beyond that limit, for those lost within it by the action of the government between the*

date of the grant and the location of the road. This construction gives effect to the whole statute, and makes each part consistent with the other."

If the appellee was not and is not entitled to indemnity only for lands lost between the date of the grant and the date of the definite location of its line of road, then it should be made to appear when and how the lands were lost for which the indemnity was obtained; and we submit that, if such evidence never was presented to the proper department, and the patent issued without requiring any evidence that any lands had been lost to the company, there was nothing upon which to find the fact of loss, and hence the patent issued without authority of law, and is invalid and voidable at the instance of the government.

III.

THE CASE OF NEWHALL *vs.* SANGER SHOULD BE HELD TO APPLY IN THIS CASE.

Counsel for the appellee claims that the grant to said company did not attach to the ten mile indemnity limits at the same time it did to the granted limits.

The grant to said company was for twenty sections per mile. If that number of sections could be found within the twenty-mile limits on each side of said road, those sections were to be taken. If, however, they were not so found, then the company was authorized to take them within the next ten miles.

This was a grant of quantity not limited to twenty miles on each side of the road as located, but to thirty miles.

If the United States owned that quantity of public lands, "not reserved, &c.," within either of the limits

mentioned, at the date of the grant, the company was entitled to demand and receive it on showing full compliance with the conditions of the grant.

Until the line of the road was located the grant was a float, and did not attach to any particular tracts of land; but when the line was located it ceased to be a float, and the right of the road attached to the public lands within the granted and indemnity limits at the same time: within the granted limits to all public lands in place; within the indemnity limits to all public lands, to supply any deficiency which might arise in the adjustment of the grant within the twenty-mile limits, through the action of the government between the date of the grant and the location of the road.

In this respect the grant is unlike the school grants referred to by counsel, and hence does not fall within the rule laid down in Lessieur *vs.* Price (12 Howard, 59). This has been the construction placed on this grant both by the company and by the officers of the Land Department throughout its entire adjustment.

On October 29, 1867, the Commissioner of the General Land Office, by his letter of that date to the register and receiver of the United States land-office at Marysville, Cal., by direction of the Secretary of the Interior, transmitted to said officers a diagram and map showing the twenty-mile limits of the grant in place, and the ten-mile limits of the grant for indemnity. (See Exhibit B.)

It also appears that the odd sections within the indemnity limits were entered upon the tract-books of the General Land Office as withdrawn for said company, under the order above mentioned. (See Exhibit C.)

On June 9, 1868, the attorney for the California and Oregon Railroad Company wrote to the Commissioner of

the General Land Office, calling his attention to the necessity of having it thoroughly understood, both by that officer and the register and receiver at Marysville, Cal., that the order of withdrawal of October 29, 1867, included the indemnity lands as well as the lands in place. (See Exhibit D.)

On September 25, 1868, the Commissioner of the General Land Office wrote to the local officers, telling them that they had misconstrued the order of withdrawal of October 29, 1867, and expressly directed them to withhold from sale and entry the odd sections within the ten-mile indemnity limits. (See Exhibit E.)

That said company still insists before the Land Department that the withdrawal of October 29, 1867, operated upon and attached to the lands within the indemnity limits, appears from a paper filed by the attorney of the California and Oregon Railroad Company with the local officers October 25, 1878, and now on file in the General Land Office (see Exhibit F), in which he says:

"The land in contest is parts of odd-numbered sections within the indemnity limits of the grant to this contestant, which was withdrawn from market by order of the honorable Commissioner, dated October 29, 1867—at the local office on the 25th day of November, 1867—to meet the exigencies of the grant in place, and until its purposes are fulfilled the withdrawal for indemnity purposes *proprio vigore*, and by the intendment of the grant, should be maintained."

It will thus be seen that the attorneys of said road, before the Land Department, have heretofore insisted and still claim that the withdrawal of October 29, 1867, included the indemnity lands as well as the lands in place, while in this court the attorney of the successor of said company insists that it did not.

We submit that it is too late now for either of said companies to claim by their attorneys, or otherwise, that the grant did not attach to the indemnity lands at the same time it attached to the lands in place, and that said companies, or either of them, are now estopped to deny that it so attached where the lands were public lands. If the grant attached within the granted and indemnity limits at the same time to the public lands, and for that reason the company has been allowed to take all of the lands then public, it is equally true that it did not, and should not be held to, attach to any lands not then public lands, although they may subsequently have become so.

Such was the rule announced in the case of the L. L. & G. R. R. Co. *vs.* United States, above cited, and such should be the rule adopted in this case.

It is conceded that the land in question at the date of the grant, the date of the definite location of the road, and of the withdrawal of lands therefor was within the claimed limits of an alleged Mexican grant *sub judice.* The tract was, therefore, reserved from sale or other disposition by the United States under the act of March 3, 1851.

If the views we have submitted are sustained by the court, the case falls clearly within the rule announced in Newhall *vs.* Sanger, and the patent to the tract in question should be held to be invalid.

IV.

If the court sustain the applicability of the decision in Newhall *vs.* Sanger to the case at bar, we do not conceive it to be necessary to now reargue that decision. Its reversal would unsettle the titles to millions of prop-

erty, and revolutionize the settled practice of the Interior Department in its administration of the public land laws. It is not to be presumed that a reargument of a decision of such general importance will be permitted by this court upon the naked suggestion of the counsel for private claimants, made for the first time in his brief upon appeal, and put forward upon propositions which, though calculated to determine doubts of importance to the appellee, have no necessary relation to the case of the appellant.

If such reargument should at any time be allowed, we submit that it should only be in a case where the same question is directly raised by the pleadings and is necessary to a decision of the case.

CHAS. DEVENS,
Attorney-General.
E. M. MARBLE,
Assistant Attorney-General.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 26, 1876.

I, J. M. Armstrong, Acting Commissioner of the General Land Office, do hereby certify that the annexed copies, marked A to D inclusive, are true and literal exemplifications from the originals and the records of the originals now in my possession and on file in this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. M. ARMSTRONG.
Acting Commissioner General Land Office.

EXHIBIT A.

LIST No. 2.

Indemnity limits, California and Oregon Branch of Central Pacific Railroad Company, Marysville District.

OFFICE OF THE
CENTRAL PACIFIC RAILROAD COMPANY,
San Francisco, California, October 30th, 1874.

I, Edward H. Miller, jr., secretary of the Central Pacific Railroad Company (successor by consolidation to the Central Pacific Railroad Company of California and the California and Oregon Railroad Company), hereby

certify that Benjamin B. Redding was appointed land-agent of the said Central Pacific Railroad Company, successor by consolidation to the said the California and Oregon Railroad Company, by the board of directors of said company, at a regular meeting held on the twenty-second (22d) day of August, A. D. 1870; and that since that time he has been continuously and is now the land-agent of the said company.

In testimony whereof, I have hereunto set my hand and affixed the corporate seal of said company, this 30th day of October, A. D. 1874.

[SEAL.] EDWARD H. MILLER, JR.,
Secretary of Central Pacific Railroad Company.

List of lands in the Marysville land district, California, selected by the Central Pacific Railroad Company, successor by consolidation to the California and Oregon Railroad Company.

The undersigned, the duly authorized land agent of the Central Pacific Railroad Company (successor by consolidation to the Central Pacific Railroad Company of California and the California and Oregon Railroad Company), under and by virtue of the acts of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon, approved July 25th, 1866, and the act amendatory thereof, approved June 25th, 1868, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, and contained in a circular dated January 24th, 1867, hereby makes and files the following list of selections of public land claimed by the said Central Pacific Railroad Company, successor to the said the California and Oregon Railroad Company, as inuring to it, and to which it is entitled, under and by virtue of the grant and provisions of the said acts of Congress, and the location

of the line of route of the said railroad and telegraph of said California and Oregon Railroad Company, being for a section of ninety-seven and $\frac{6}{10}$th miles of said road: Commencing at a point in the town of Roseville, in the county of Placer, State of California, where said railroad and telegraph line connects with the Central Pacific Railroad, and terminating at a point twenty (20) miles beyond the town of Chico, in the county of Butte, in said State, at the end of the ninety-seventh and $\frac{6}{10}$ mile, which said section of road and telegraph line has been duly accepted by the President of the United States, as provided in the aforesaid acts of Congress; the selections being particularly described as follows, and being within the exterior ten (10) mile limits allowed for indemnity on each side of the line of route of said railroad.

Part of section.	No. of section.	No of town.	No. of range.	Area.		Fees of register and receiver.	
				Acres.	100.		
* * * *	*	*	*	*	*	*	*
Fract'l E. ½	3	16 N.	2 W.	319	61	4	00
* * * *	*	*	*	*	*	*	*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Benjamin B. Redding, being duly sworn, depose and say that I am the land agent of the Central Pacific Railroad Company (successor by consolidation to the Central Pacific Railroad Company of California and the California and Oregon Railroad Company); that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said Central Pacific Railroad Company, successor to the said The California and Oregon Railroad Company, for which a grant of land was made by the acts of Congress entitled An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific

Railroad in California to Portland in Oregon, approved July 25th, 1866, and the act amendatory thereof approved June 25th, 1868; that the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant lying within the limits of the exterior ten (10) miles indemnity limits on each side of the line of route of said road, being for a section of ninety-seven and $\frac{6}{10}$th miles of said road, commencing at a point in the town of Roseville, in the county of Placer, State of California, where said railroad and telegraph line connects with the Central Pacific Railroad, and terminating at a point twenty (20) miles beyond the town of Chico, in the county of Butte, in said State, at the end of the ninety-seventh and $\frac{6}{10}$th mile.

BENJAMIN B. REDDING.

Subscribed and sworn to before me this 30th day of October, A. D. 1874.

[NOTARIAL SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, William Harney, county clerk of the city and county of San Francisco, and *ex officio* clerk of the county court probate court, municipal criminal court, and of the third, fourth, twelfth, fifteenth, and nineteenth judicial district courts of the State of California, in and for said city and county (all of which courts are courts of record having seals), do hereby certify that Charles J. Torbert, whose name is subscribed to the annexed affidavit, was, at the time of signing the same, a notary public in and for said city and county duly commissioned and qualified and authorized by law to take such affidavit, and full faith and credit are due to all his official acts as such. And I do further certify that I am well acquainted with the handwriting of the said Charles J. Torbert and verily believe that the signature to the said annexed affidavit is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said district court of the 12th judicial district of the State of California, in and for the city and county of San Francisco, at my office in said city and county, this eighteenth day of December, A. D. 1874.

[COURT SEAL.] WILLIAM HARNEY,

County Clerk of the City and County of San Francisco, and ex officio Clerk of the District Court of the Twelfth Judicial District of the State of California, in and for the City and County of San Francisco.

UNITED STATES LAND OFFICE,
Marysville, California, A. D. 1874.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Central Pacific Railroad Company, successor by consolidation to the California and Oregon Railroad Company, under the grant to said California and Oregon Railroad Company by the acts of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July 25th, 1866, and the act amendatory thereof, approved June 25th, 1868, and selected by Benjamin B. Redding, the duly-authorized land-agent of said Central Pacific Railroad Company, successor by consolidation to the said The California and Oregon Railroad Company, and we have tested the accuracy of said list by the plats and records of this office, and we find the same to be correct; and we further certify, that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limits of the exterior ten (10) miles on each side; and that the same are not, nor is there any part thereof, returned and denominated as mineral lands or land, nor claimed as swamp land; neither are there any homesteads, pre-emptions, State, nor other valid claim

to any portion of said lands on file or record in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress, approved July 1st, 1864, and contemplated by the instructions dated January 24th, 1867, and addressed by the Commissioner of the General Land Office to the registers and receivers of United States Land Offices, and that the said Central Pacific Railroad Company, successor by consolidation to the California and Oregon Railroad Company, has paid to the undersigned, the receiver, the full sum of twelve hundred and five ($1,205) dollars, in full payment and discharge of said fees.

L. B. AYER,
Register of United States Land Office,
Marysville, California.

ELI TEEGARDEN,
Receiver of United States Land Office,
Marysville, California.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 26, 1878.

I, J. M. Armstrong, Acting Commissioner of the General Land Office, do hereby certify that the annexed transcript is a true and literal exemplification from page numbered twenty-five, of tract book numbered four, of lands lying north and east of Mount Diablo base and meridian, Marysville district, in California, and correctly shows the notes and entries upon said page 25, so far as they relate to the tracts described therein.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. M. ARMSTRONG,
Acting Commissioner General Land Office.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 29, 1867.

REGISTER AND RECEIVER,
Marysville, California:

GENTLEMEN: The Secretary of the Interior has transmitted to this office a map of the designated line of route of the California and Oregon Railroad, between Roseville, on the Central Pacific Railroad, and Salt Creek, in township 32 N., of range 5 W., Mount Diablo meridian, State of California, and directed the withdrawal of the lands granted thereto under the act of Congress approved July 25th, 1866. (Statutes, vol. 14, p 239.)

In compliance with the Secretary's instructions, I herewith enclose a diagram map, showing by pink line the 20 miles limits of the grant "*in place*," so far as the same falls to *said road* in your district, with 10 additional miles indemnity limits, as indicated by green line, to make up the indemnity.

You are hereby directed to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections and parts of sections within the granted limits. You will proceed at once to lay down distinctly in pencil on the township plats the limits, then make the proper notes, showing the odd sections to be reserved.

The vacant undisposed-of odd-numbered sections within the 20-mile limits of said road, as indicated in the diagram, inure "*in place*" to the company, except wherein there exist pre-emptions having prior inceptions.

In virtue of the act of Congress approved Mar. 3, 1853, the even sections within the granted limits are subject to pre-emption at $2.50 per acre, and must be dealt with accordingly, and in like manner under the homestead law, which reduces the quantity to 80 acres.

The even sections within the 20 miles will not be subject to private entry until duly offered at the increased price. This order will take effect from the date of its

reception at your office, and you will advise this office of the precise time it may be received by you.

In your reply please refer to this as "M" by its date.

Respectfully, your ob'd't serv't,

JOS. S. WILSON,
Commissioner.

EXHIBIT C.—TOWNSHIP No. 16 NORTH, RANGE No. 2 WEST, DISTRICT OF ——.

Odd sections withdrawn for C. & O. R. R., 30-mile limit. Letter to R. & R. rec'd & filed at Marysville Nov. 25, 1867.

Description of tract.				Contents.		Rate per acre.		Purchase money.		Name of the purchaser.	Date of sale.	Number of receipt and certificate of purchase.	By whom patented.	Date of patent.	Where recorded.	
Part of section.	Section.	Township.	Range.	Acres.	100ths.	Dollars.	Cents.	Dollars.	Cents.						Volume.	Page.
	1	16 N.	2 W.	Suspension relieved Oct. 1, 1873. This township in contest in Div. "F," United States *vs.* Cen. Pac. Railroad Co., successor to Cal. & Oregon R. R. Co. Case decided in favor of U. S.; claim of the railroad rejected. See case of C. P. R. R. *vs.* State of Cal., in Land Owner for January, 1878.												
	2	"	"	.....												
	3	"	"	.....												
* * *	*	.....	*	.....	*	.....	*	.....	*	*	.....	.....	.....	.....	.....	.....
Home.....	"	"	"	159	61	.....	.....	10	00	David William Wilson.	July 14, 1876.	1739	Act 1862. Relinquished & canceled Sep. 18, 1877.			
Lot 4 of N.W. ¼ & fl E. ½.	"	"	"	358	94	Selected Oct. 30, 1874, by C. & O. R. R., under acts of July 25, 1866, & June 28, 1868, list 2. Pat'd March 17, 1875.										
* * *	N. E. ¼ in contest in Div. "F."															
* * *																
* * *																
* * *																
* * *																
* * *																
Home, S. E. ¼...	"	"	"	160	00	.....	.....	10	00	Michael Ryan	July 14, 1876.	1738	Act 1862.			
* * *	S. E. ¼ in contest in "F."															
* * *																
* * *																
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EXHIBIT D.

WASHINGTON, D. C., *June 9th*, 1868.

Hon. JOS. S. WILSON,
Com'r of the General Land Office:

SIR: I would respectfully call attention to your instructions of the 29th Oct., 1867, addressed to the local officers at Sacramento, Marysville, & Humboldt, California, ordering a withdrawal of lands along the line of the California & Oregon Railroad, located from Roserville, on the Central Pac. R. R. of Cala., to t'p 32 N., range 5 W., M't Diablo meridian, under the grant by act of Congress approved July 25, 1866, and would respectfully request, for the protection of the interests of the R. R. Co., that the withdrawal be noted on the proper tract-books of your office.

I infer, from what information has reached me, that this withdrawal, as respects the *odd-numbered sections*, is understood by your office, and the officers to whom it was addressed, as extending to the 30 miles indemnity limits.

This is certainly necessary, in order to the due realization of the grant, because of the numerous sales and other exceptions of odd-numbered tracts (which are known to exist) within the limits of the "grant in place."

In behalf of the company, I am, sir, very respectfully, your ob't serv't,

HENRY BEARD,
Att'y.

EXHIBIT E.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., Sept. 25, 1868.

REGISTER,
Marysville, California:

SIR: I am in receipt of your letters of the 17th ultimo and 7th inst., transmitting the records of proceedings

in the matter of your rejection of the application of W. S. Green and Peter Decker to purchase at private entry certain lands in your district that fall within the 10 additional miles "indemnity" limits of the California and Oregon Railroad at $1.25 per acre. In answer, I have to say that you have misconstrued the instructions of withdrawal of Oct. 29th, 1867, so far as regards the even sections lying between the 20 and 30 *miles* limits of said road.

The instructions above referred to directed you to withhold from disposal all the *odd sections* for 20 miles on each side of the line of road indicated on diagram as grant *in place*, and to hold the *even* sections within said 20 mile limits at $2.50 per acre, subject *only* to pre-emptors, and homestead entries at the increased price.

In regard to the lands in question that fall within the *additional limits* of ten miles, I have to direct you to withhold from entry the *odd* sections granted as "indemnity" lands, and in no manner whatever are the *even* sections within said latter limits affected by the grant of July 25, 1866.

It appears from your report in the matter that *other* parties had made applications to enter the tracts by private entry previous to Messrs. Green and Decker, and such prior application had been denied because you had kept out of market the lands in this category. Therefore, in view of the fact that you had so kept them out of market, and in order to give every one an equal and fair opportunity to purchase, you will restore them to market; that is, to ordinary or other entry, after at least thirty days' public notice in a newspaper of the largest circulation in your district. You will fix as to the day when you will be prepared to admit applications. If, at that time, two or more persons should desire to purchase the same tract, you must put it up to the highest bidder. (See the 4th section of the act of 24th April, 1820, vol. 3, p. 506.)

You will please note in your records the even sections between the 20 and 30 mile limits as not being interfered

with by the railroad grant of 1866, and advise this office to that effect and the receipt of these instructions.

Respectfully, your ob't serv't,

JOS. S. WILSON,
Commissioner.

EXHIBIT F.

In the General Land Office of the United States.

Before the Hon. Commissioner.

ELIHU HOLCOMB, JOHN P. TUTTLE, and DELOS P. TURNER, *v.* THE STATE OF CALIFORNIA, AND the California and Oregon Railroad Company.	Involving E. ½ of S. E. ¼ sec. 3 and N. ½ sec. 11, t'p 19 N., R. 3 W., M. D. M.

The California and Oregon Railroad Company, one of the contestants named in the above-entitled action, hereby appeals to the Hon. Secretary of the Interior from the decision of the Hon. Commissioner of the General Land Office, made and filed in said action on the 25th day of September, 1878, against this contestant and in favor of the claimants, upon the following grounds, among others, to wit:

1st. That the Hon. Commissioner erred in deciding that this contestant relinquished all its right to said land at the trial in the local office, for that—

a. The record shows that said company appeared at the trial in the local office by its attorney.

b. The record does not show that its attorney at such trial waived or relinquished any of its rights in the premises.

c. There is no written relinquishment in said record purporting to be signed by any authorized officer of said company, or by any one in its behalf, relinquishing any right or claim of any nature or description in the premises.

2nd. The Hon. Commissioner erred in not awarding the land in contest to the contestant as against the claimants, for that:

a. The land in contest is parts of odd-numbered sections within the indemnity limits of the grant to this contestant, which was withdrawn from market by order of the Hon. Commissioner dated October 29th, 1867, at the local office on the 25th day of November, 1867.

b. To meet the exigencies of the grant in place and until its purposes are fulfilled, the withdrawal for indemnity purposes, *proprio vigore* and by the intendment of the grant, should be maintained.

c. If the claim of the State of California to said tracts is not good, it is bad not by reason of *laches*, but by matters affecting such claim at the date of its inception. If void at all, the claim of the State was void *per se* and not merely *voidable*.

d. The right of the company attached at the withdrawal, but the nature of the grant of indemnity or lien makes it ever active, ever offering other lands for those lost in the grant in place, and, therefore, when it was determined that the claim of the State to the land was not good, the right of the company thereto became good and perfect *eo instante*, though as of the date of its grant.

The decision of the Hon. Commissioner must be overruled, and the land in contest awarded to the company as against the claimants.

EDW'D BELCHER,
Atty. for C. & O. R. R. Company.

(Endorsed:)
Filed October 25, 1878.
CHAS. M. PATTERSON,
Register.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
December 26, 1878.

I, J. M. Armstrong, Acting Commissioner of the General Land Office, do hereby certify that the annexed

copy of list numbered two, of selections of certain lands in California, by the Central Pacific Railroad Company, successor by consolidation to the California and Oregon Railroad Company, is a true and literal exemplification from the original, now in my possession and on file in this office, so far as relates to the tract described.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

[SEAL.] J. M. ARMSTRONG,
Acting Commissioner General Land Office.

Jany 27. 79. Rec'd W. H. Swayne

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

MICHAEL RYAN, APPELLANT,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, APPELLEE.
} No. 983.

SUPPLEMENTARY BRIEF FOR UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

MICHAEL RYAN, APPELLANT,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, appellee.
No. 983.

SUPPLEMENTARY BRIEF FOR UNITED STATES.

THE RULE IN NEWHALL VS. SANGER APPLICABLE TO THIS CASE.

The rule announced in the case of Newhall *vs.* Sanger is to the effect that lands within the boundaries of an alleged Spanish or Mexican grant, which was *sub judice* at the time the lands were withdrawn along the route of the road adopted by the railroad company, are not embraced in the grant to such company. (2 Otto, 761.)

It is conceded that the tract involved in this suit, at the date of the grant, was within the claimed limits of the so-called Manuel Diaz grant, then *sub judice*, and it cannot be controverted that at the date of the withdrawal for the company of which the defendant is the successor said Mexican grant was still *sub judice*.

It was fully shown in the brief heretofore filed that the withdrawal for the company of which the defendant is the successor included the lands within the granted and indemnity limits alike, and that said company, by its attorneys, has claimed, and still insists before the Land Department, that the lands within the indemnity limits should still remain reserved to satisfy the grant made to said company.

It is admitted by counsel for defendant in his brief (p. 5) that if the right of the company attached to the lands within the granted and indemnity limits at the same time, then the rule in the case of Newhall *vs.* Sanger will apply to this case and govern its decision.

The question therefore arises, did the withdrawal for said company properly and necessarily include the lands within the indemnity limits?

The grant to said company is in the second section of the act of July 25, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland in Oregon," and reads as follows, viz:

"SECTION 2. *And be it further enacted*, That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers,

pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located, and *within the limits before specified*." * * * (14 Statutes, 239.)

The grant to said company was a grant *in presenti*, and acquired precision upon the definite location of the road. (Railroad Company *vs.* Smith, 9 Wallace, 95; Schulenberg *vs.* Harriman, 21 Wallace, 60; L. L. & G. R. R. Co. *vs.* United States, 2 Otto, 741.)

Upon the definite location of the road it was made the duty of the Secretary of the Interior to order a withdrawal from sale of public lands granted "*within the limits before specified*." What were the limits specified? Manifestly thirty miles on each side of said line of road. The language of the grant is "twenty alternate sections per mile (ten on each side) of said railroad line." Ten alternate sections on either side of said road could only be found by extending over a space of twenty miles.

This is the first limit mentioned in the act.

If the twenty alternate sections were not found within that limit, then the company had the right to select other lands in lieu of those "sold, reserved, occupied

by homestead settlers, pre-empted, or otherwise disposed of" *within the next ten miles.*

This is the second limit mentioned in the act.

The act, however, requires the withdrawal of the public lands "within the limits before specified," the plural being used, evidently, to include both limits mentioned in the act. Where the word "limits" occurs in the preceding part of this section it refers to the limits of twenty miles on each side of the line adopted, but in the clause "within the limits before specified" it refers to the entire limits of the grant.

The order of withdrawal, therefore, properly and necessarily embraced the lands within both the twenty and ten mile limits. A withdrawal in any other manner would not have been in accordance with the terms of the granting act. Certainly Congress would not have required the lands within the indemnity limits to be withdrawn if they were not included in the grant.

The grant to said company was a grant of quantity, viz, twenty sections per mile, ten on each side of said road as located, provided the United States at the time of the definite location of the road owned that quantity within thirty miles on either side thereof.

As before stated, the grant acquired precision upon the definite location of the road. It is urged that it acquired precision only as to the lands included within what is termed the granted limits. This is clearly incorrect. Every alternate section of public land within the indemnity limits, so called, was, by the order of withdrawal, made subject to the grant. By the definite location of the road, and the order of withdrawal, the company acquired a vested right in each of said sections, viz, a right to have such section patented to it, provid-

ing any section of land was lost by any of the ways specified in the act within the first limits mentioned, viz, twenty miles.

While it is true that the title to each of the alternate sections within the indemnity limits did not pass absolutely upon the location of the line of road, it is also true that the right to acquire title to said sections was granted. Upon the order of withdrawal being made, as provided in the act, the right to dispose of said sections by the United States ceased. Where title is acquired within the indemnity limits it is not by virtue of the selection but by virtue of the grant, although that is made definite by the selection. The title to public lands can only be disposed of by Congress. This disposal may be made either by a general or special law. (Wilcox *v.* Jackson, 13 Peters, 498; Bragnell *v.* Broderick, *Ib.*, 436.)

It is admitted by counsel for the defendant that under the present rulings of the Land Department, it is held that the grant to said company attached to all of the public lands within what is termed the granted, and within the indemnity limits at the same time.

While the construction placed upon the act by the Land Department is not binding upon this court, still it is entitled to great respect (United States *v.* Dickson, 15 Peters, 141), and we submit that the defendant having received the benefit of such construction, and thereby obtained thousands of acres of valuable lands which otherwise would have been sold by the government, while thousands of acres of other lands have been, and still are, withheld from sale and disposal, should not be permitted now to question the correctness of such construction.

The grant to said company has thus far been adjusted

in accordance with the present rulings of said department, and all of the public lands within the indemnity limits have been subjected to the operation of its grant for the purpose of satisfying the same.

This construction, we submit, is the true construction to be given to the act, so far as the lands were public lands. The grant became fixed when it was located, and ceased to be a float; it had definite and specified limits within which the company could take sufficient lands to satisfy it. In this respect it is unlike the school and internal improvement grants, referred to by counsel for defendant. In those grants the limits from which they may be satisfied are co-extensive with the boundaries of the States. The grant being a grant *in presenti*, and acquiring precision upon the definite location of its line of road, we submit that unless the lands at that time were public lands of the United States, subject to disposal, it did not attach to them. If it did not attach to them at that time, it could not be made to attach to them at any subsequent time.

The right to select lands in lieu of other tracts lost could only be exercised on such lands as the grant attached to. The government did not guarantee that there was a sufficient quantity of lands upon any line which the company might adopt to satisfy the grant made, and there is nothing in the language of the act which indicates an intention on the part of Congress to make any lands subject to its provisions which were not subject to those provisions at the date of the definite location of the road. These lands at that time were reserved, under the act of March 3, 1851, until the validity of the alleged Mexican grant was finally determined. Being so reserved the grant could not attach to them, and we sub-

mit that the grant made to said company cannot be satisfied out of lands which were not subject to its provisions at the time the company adopted the line upon which its road was to be built.

CHAS. DEVENS,
Attorney-General.
E. M. MARBLE,
Assistant Attorney-General.